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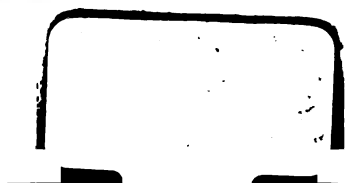
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A SELECTION
OF
LEADING CASES
IN
CRIMINAL LAW:
WITH NOTES.

BY
EDMUND HASTINGS BENNETT,
AND
FRANKLIN FISKE HEARD.

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TO THE
HONORABLE JOHN HENRY CLIFFORD, LL. D.

ATTORNEY-GENERAL

OF THE
COMMONWEALTH OF MASSACHUSETTS,

THIS VOLUME IS RESPECTFULLY DEDICATED

BY THE AUTHORS.

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LEADING CRIMINAL CASES.

THE KING *v.* WARD.¹

January 12, 1836.

Nuisance—Compensation for, no Defence to an Indictment.

On the trial of an indictment for a nuisance in a navigable river and common king's highway, called the harbor of C., by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counter-balanced by the public benefit arising from the alteration, amounts to a verdict of guilty. It is no defence to such an indictment, that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port.

INDICTMENT, stating that the Medina River was an ancient navigable river and common king's highway for all the liege subjects, &c., with vessels, boats, &c., to pass, repass, and navigate, &c., and that the defendant, in a certain part thereof called Cowes Harbor, upon the soil and in the waterway of the said river and highway, did erect and continue a certain building of stones, &c., across the stream and waterway of the said river, by reason whereof the liege subjects, &c., could not pass, repass, and navigate, &c., as they before used, and of right ought, &c.² Plea, Not Guilty. This indictment was tried before Lord DENMAN, C. J., at the Winchester Summer assizes, 1834. The principal points of the case, as stated by his lordship, in delivering judgment upon the motion made to set aside the verdict as after mentioned, were as follows:—

The subject of indictment was a causeway projecting into the water, and raised on a kind of platform. The causeway originally was of gravel, shingle, and stone, called a hard, and went sloping

¹ 4 Adolphus & Ellis, 384; 6 Nevile & Manning, 38.

² See the indictment more fully set out at the end of this case.

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down to the water. The defendant's father had sued out a writ of *ad quod damnum*, under which the proceedings were regularly conducted to their close; then he removed the causeway, and made a new one along the water's edge, considerably to the south. In the year 1833, this new causeway or wharf¹ was considerably lengthened in the same direction, which was inwards up the harbor. It was also then first raised on piles, and much heightened, and, instead of sloping down, it is now, at the extremity, five feet four inches higher than the shore.

The indictment was preferred by the corporation of Newport, on the complaint of the harbor-master and water-bailiff, who are sworn to present nuisances in the harbor. The case which the prosecutors sought to establish, may be taken from the following passage, which I copy from my note of the harbor-master's evidence: "The causeway is decidedly an inconvenience to the navigation. Small vessels of twenty-six or twenty-eight tons are much obstructed in their tacking, when making their way up to Newport with the tide. They were in the habit of using a setting-pole, which this prevents, and sends them out into the best² of the water." He described also some inconvenience to which square-rigged vessels, lightermen, and row-boats were exposed in consequence of the present state of the causeway, both as to navigation and landing. Many witnesses were called in support of these allegations. On the defendant's part, some witnesses denied the existence of these inconveniences altogether; others represented them as very trifling. But he mainly placed his defence on the advantages obtained by the public from the general result of the alteration, which were thus described by the captain of a steamboat: "I consider the alteration a great benefit to the public; first, in launching and landing boats more readily; secondly, steamboats" (and of course other vessels) "can approach where they could not; thirdly, vessels obtain shelter from the quay." And these results were hardly disputed on the part of the prosecution. The learned counsel cited *Rex v. Russell*, 6 B. & C. 566, and Hale, *De Portibus Maris*, p. 85, ch. vii., Hargrave's Law Tracts.

In summing up the evidence after a long trial, I asked the jury to state their opinion whether the causeway in its altered state was a nuisance to the navigation of the river; and whether the public benefit was greater than the inconvenience. The jury, after deliberation, stated that an impediment had been created; but I declined to receive

¹ There was a wharf in front of the Fountain Inn (not complained of) with which the causeway communicated; see p. 387, Adol. & Ellis. The counsel on both sides treated the wharf and causeway as distinct.

² The witness explained this to mean the deepest.

Nuisance — Compensation for, no Defence to an Indictment

that expression, as not necessarily equivalent to the word nuisance, which might be too trifling in degree to be properly so called. They said at length that they considered it to be a nuisance; but they added, both at first and at last, that the inconvenience was counter-balanced by the public benefit arising from the alteration made by the defendant.

In addition to the facts recapitulated as above by the Lord Chief Justice, the following particulars were stated at the trial, some of which were adverted to in argument upon the after-mentioned rule: The causeway built by Mr. Ward the father was erected in 1823. The whole was the defendant's private property. It was represented, on behalf of the prosecution, that the causeway extended below low water-mark. On the defendant's part, this was denied to be the case, except at particular tides. The way from the present causeway into the town of Cowes, was either through the Fountain Inn, which was Mr. Ward's property, or under an archway, formed by part of the Fountain premises. The latter passage, and the causeway, were open at all times for landing and embarking. It was stated as probable that the number of persons using the causeway for those purposes, in a year, amounted to 50,000. Steamboat proprietors paid 2*d.* for each passenger landing and embarking, which amounted to 200*l.* a year.¹ Other persons landed and embarked without paying. Instances were mentioned, in which persons going to and from a particular steamboat had been forbidden to land where the other steamboat passengers landed; but this appeared to have taken place at the wharf, and before the defendant's time. Cattle and goods landed, or going out, were paid for, but not in all instances. There are other places in Cowes, where persons are at liberty to land and embark at all times, but no other where it is always convenient to do so. Some evidence was given (but contradicted by the defendant's witnesses) to show that the causeway had occasioned accumulations of sand and mud in parts of the harbor. In answer to the evidence adduced to show that the causeway narrowed the space for tacking, and thereby interfered with the navigation, it was stated that there was a line of moorings farther out in the stream than the end of Mr. Ward's causeway, on the same side, and a similar line on the opposite side; that pilot and other vessels constantly lay at these moorings; that the space between them and the shore was usually occupied by small boats; and that the regular course for ves-

¹ It was represented, on behalf of the defendant, that the payments mentioned were required at the wharf only, and that the causeway (as distinguished from the wharf) was free.

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sels going up the Medina, was between the two lines of moorings. But it was also stated that vessels tacking often kept their course as far as the depth of water would allow; that, at the place in question, the harbor was very narrow, and the tide strong, and that it was often important for vessels working in or out to have an opportunity of making as long tacks as possible. *Follett*, in addressing the jury, for the defendant, insisted, not only upon the usefulness of the work in question to the harbor, but also upon the benefit conferred by it on the Isle of Wight generally, in favoring the resort of visitors.

On the above finding of the jury, *Follett*, in the ensuing term, obtained a rule to show cause why a verdict of Not Guilty should not be entered, on the ground that the finding amounted to an acquittal. In the last term, November 18, before Lord DENMAN, C. J., PATTERSON, WILLIAMS, and COLERIDGE, JJ.,

Erle and *Sewell* showed cause. The benefits arising from this work are either inconsiderable, or felt only by a portion of the public. They are for the most part received only at particular seasons, whereas the obstruction is constant. No permanent right of access to this causeway is given to the public; some persons have been warned off; others pay to embark or disembark. And, supposing that the defendant had dedicated the causeway to the public as far as lay in him, it does not appear that his own right to the soil was more than temporary, in which case there could be no dedication unless the owner of the fee consented. *Wood v. Veal*, 5 B. & Ald. 454. The act of erecting this causeway was not done in immediate exercise of any of the rights appertaining to a port, as the right of passage, of landing and embarking, of fishing, or of staying for shelter or to take in goods, although it might ultimately favor the enjoyment of those rights. The immediate act was a nuisance to known vested rights, and is not to be justified by a reference to distant results, or advantages to be reaped by a different part of the community from that which suffers the inconvenience. No authority, unless it be *Rex v. Russell*, 6 B. & C. 566,¹ contradicts this proposition. In that case the defendant's counsel mainly relied upon Hale, *De Porti-*

¹ In answer to an inquiry made by the Court, as to this case, at the beginning of the present argument, *Cresswell*, J., stated that a fresh indictment had been preferred against Mr. Russell, raising the same question as before; that the cause had been tried at the Carlisle assizes before *Hullock*, B., and certain facts found by the jury, which were to have been made the basis of a special verdict; but that, in consequence of the death of the learned Judge, difficulties had arisen in settling the verdict, and the case had not proceeded; one cause of which was, that the question had been rendered less important by the general use of steamboats for towing.

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bus Maris, part ii. c. vii., Harg. Law Tracts, 85. Lord Hale there gives several examples of nuisances "common to all men that have occasion to come, go, or stay at ports." The fourth of these is "the building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed." That is stated absolutely, and without limitation, as a head of nuisance. It may be said that in the following paragraph, where he gives, as a fifth instance, "the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden," he adds, "for it is to be observed, that nusance or not nusance in such case is a question of fact." But the preceding instance is stated positively, and without qualification, as one of nuisance. In this fifth paragraph, Lord Hale merely shows that, where a structure is erected below the high water or the low water-mark, it is not therefore inevitably a nuisance; as, for example, if it be built in a place where the water flowed among shallows: and undoubtedly other instances of the same kind might be put, where the structure could not possibly be a nuisance. Hale's conclusion is that, in the case "of building within the extent of a port in or near the water, whether it be a nusance or not is *questio facti*, and to be determined by a jury upon evidence, and not *questio juris*." The jury are to say whether or not the thing complained of is a nuisance to any right existing, and which can be known at the time. Here the jury have found *Mr. Ward's* causeway to be such a nuisance; and, if that has been rightly found within the meaning of the passages of Hale referred to, it is no answer to say that some benefit is produced. A nuisance is, in the contemplation of the law, criminal; and it is against first principles to say that there can be a compensation or set-off for a crime. In *Rex v. Lord Grosvenor*, 2 Stark. N. P. C. 511, also referred to in *Rex v. Russell*, 6 B. & C. 566, Abbott, C. J., left it to the jury, "whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the River Thames has been affected or diminished by this alteration." He does indeed say: "The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered." But the mode of putting the case there was consistent with the construction just given to the passages in Hale. The question substantially laid before the jury was, whether, considering the advantages arising from the existence of the recess which had been blocked up, the public had, upon the whole, any beneficial right in its continuance. The Lord Chief Justice was evidently of opinion that if, at the time of the erection, the public was deriving any benefit from the state of things interfered with by the act of the defendants, they were not entitled to take that benefit away. He says, at

the end of his address to the jury: "The question is, whether if this wharf be suffered to remain, the public convenience will suffer."—"Although the benefits which were enjoyed before the erection, were limited to particular times and seasons of the weather, and were enjoyed but occasionally, yet the public is not to be deprived of them by the erection of a wharf for mere private convenience." His lordship did not there look to any but the immediate effects of the alteration; and, even if a wider construction could be given to his language, the question put by him could be carried no farther than this; whether the public, formerly exercising the right said to be taken away, reaped greater benefit from the alteration, than the same public had derived from the original state of things. But even that construction would not affect the present question; for not only are the injury and benefit not *ejusdem generis*, but one portion of the public suffers, and another receives the compensation.

There does not appear to be any authority upon the point since this case, except *Rex v. Russell*, 6 B. & C. 566. In that case there were peculiar circumstances. The staiths had in some degree been recognized by an act of parliament, which gave the public certain rights in resorting to them, and so far made them a matter of public concern. Besides, the question being whether or not the staiths were a nuisance to the navigation of the River Tyne, it was proved that they benefited in one respect, namely, by clearing it of keels. The alleged injury to the navigation was attended by a direct benefit to the navigation. Lord Tenterden thought that, if the case had been left to the jury entirely upon the question of injury to the navigation, and a verdict found for the defendants, no objection could have been taken. It is true that Bayley and Holroyd, JJ., thought that Bayley, J., had properly directed the jury, in his summing up, to take into their consideration advantages accruing to distant portions of the community; but Lord Tenterden was of a different opinion. This case was relied upon in argument in *Rex v. Pease*, 4 B. & Ad. 30; but the Court, there, treat the decision as questionable. The authorities cited for the prosecution in *Rex v. Russell*, 6 B. & C. 566, show that an individual cannot justify interfering with public rights of his own authority, even where it may be alleged that in so doing he has given some benefit to the public. *Rex v. Warde*, Cro. Car. 266; *Payne v. Partridge*, 1 Salk. 12. In *Hind v. Mansfield*, Noy, 103, it was laid down, without qualification, that an individual could not divert part of the River Thames, and thereby weaken the current, without an *ad quod damnum*, "because that river is as an highway."

To allow the kind of defence attempted in this case would introduce very inconvenient inquiries. For example, it is alleged that the

work complained of promotes the general prosperity of the Isle of Wight, by favoring the resort of visitors and giving an impulse to trade and to improvements. How can a jury try such a question? They can estimate the injury done in a particular quarter; but the benefit which may be indirectly conferred upon places at a distance, is too wide a subject for them to enter upon. So, in *Rex v. Russell*, 6 B. & C. 566, it was said that the coal staiths produced an ultimate benefit to the inhabitants of London; but a Northumberland jury could not judge of that. Nor is the principle a just one, that a nuisance in one place may be compensated by any degree of benefit conferred in another; as if a gasometer created a nuisance in Southwark, and it was answered that the gas lights connected with it were beneficial to a street in London. No comparison can be instituted between accommodation to one set of persons and loss of rights to another. And where would this kind of justification stop? If an actual benefit may be alleged, so may an intended benefit. A man may erect a causeway which will be convenient to steamboats in a place where none are used, but where he says he will establish them; or he may turn an ordinary highway into a railway, and justify it by the increased convenience to those who will use steam carriages; which, however, according to the judgment of Lord Tenterden, in *Rex v. Sir John Morris*, 1 B. & Ad. 447, would be no excuse.

[PATTESON, J. The present question was not much considered there: Lord Tenterden held, that the doctrine said to be established by *Rex v. Russell*, 6 B. & C. 566, was not applicable; and his observation, which has been referred to, was this: "It is said, indeed, that all persons may use this railway who will pay for so doing; but no man has a right to tell the public that they shall discontinue the use of such carriages as they have been accustomed to employ, and adopt another kind, in order to pass along a new description of road, paying him for the liberty of doing so."]

Sir *W. W. Follett* and *Bere*, contra. The real question is, not whether a person may obstruct the navigation of a harbor, and look, for his justification, to advantages resulting in other places; but whether he may not erect a structure in a port, which is an impediment to the navigation, but which is, on the whole, a benefit to that port. (They commented at length upon the facts proved, with reference to these points.) The question, how far the public had acquired a right to use the causeway, went to the jury as part of the question of benefit. The taking of two pence from the steamboat passengers did not disprove the right: that payment was made for landing at the wharf. As to the causeway, the evidence for the prosecution did not establish that any restriction of this kind existed. The doc-

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trine of *Rex v. Russell*, 6 B. & C. 566, need not come under discussion; nor is there any conflict of authorities. Erections may be made in a harbor, below high water-mark, and in places where vessels might perhaps have sailed; and the question whether they are a nuisance or not will depend on this,—whether, upon the whole, they produce public benefit; not giving to the terms “public benefit” too extended a sense, but applying them to the public frequenting the port. If this view of such cases were not admitted, every wharf in the port of London, perhaps, would be a nuisance, because it occupied a space over which some boat might have been punted; and no lapse of time could render it legal. Suppose the Plymouth Breakwater to have been erected by an individual; could that be called a nuisance to the port? It impedes the navigation, but the benefit to the port counterbalances that inconvenience. The same may be said of the Cobb at Lyme. Suppose a harbor had in it a shoal, which might be sailed over at high water, but was dangerous at other times, and a vessel were moored there to point it out; that would not be a nuisance, but a cause of safety. There is a fallacy in comparing this case with that of a highway. A highway is for passage only; and, in general, that which impedes the passage is a nuisance to the highway. But a port is not merely a place of passage: “A port is a haven, and somewhat more. 1st, It is a place for arriving and unloading of ships or vessels.” Hale, *De Portibus Maris*, part ii. ch. ii., Harg. Law Tracts, 46. An erection made in a port, though it impede the passage, is not necessarily a nuisance, because the public has other and more important rights in a harbor than that of passage, and to these the thing done may be advantageous; and whether, taking these into consideration, the erection be a nuisance or not, is a question for the jury. This is laid down in the judgment of Holroyd, J., in *Rex v. Russell*, 6 B. & C. 586, 587.¹ Here the question has been decided by a jury in the defendant’s favor. Lord Hale (*De Portibus Maris*, part ii. ch. vii., Harg. Law Tracts, 85,) mentions as a nuisance common to all men using a port, “the building of new wears or inhancing of old, whereby navigation or passage of vessels is obstructed.” The argument for the prosecution in this case is, in effect, that every building which at all straitens the passage, is within this clause. But Lord Hale goes on to add, as another instance, “the straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden;” and he proceeds, “for it is to be observed, that nusance or not nusance in such case is a

¹ Sir W. W. Follett here read the passage beginning, “But, independently of these statutes,” and ending, “in law a nuisance.”

question of fact. It is not therefore every building below the high water-mark, nor every building below the low water-mark, is *ipso facto* in law a nuisance; for that would destroy all the keys that are in all the ports in England. For they are all built below the high water-mark; for otherwise vessels could not come at them to unlade; and some are built below the low water-mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, for the king cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the king's, the building below the high water-mark is a purpresture, an incroachment and intrusion upon the king's soil, which he may either demolish or seize, or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a nuisance or not is *quæstio facti*, and to be determined by a jury upon evidence, and not *quæstio juris*." The whole result of this and other authorities is that, although the port may be straitened, the question, nuisance or no nuisance, is for the jury upon the whole of the facts. Even in the case of a high road, it is not true that every obstruction to the right of passage is a nuisance. The public may have other rights on a highway. A market or fair is in many instances lawfully held in a public street. A hoard placed in front of a building while it undergoes repair, is not a nuisance, though it obstructs the highway.

In *Rex v. Lord Grosvenor*, 2 Stark. N. P. C. 513, Abbott, C. J., in his summing up, said: "The question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the River Thames, has been affected or diminished by this alteration." The defendant here relies upon the benefit reaped by the public, and not upon any private advantage, nor does any accrue to him. The present case does not involve any point on which the Court differed in *Rex v. Russell*, 6 B. & C. 566. Bayley, J., there says, in delivering judgment: (p. 593) "The only point upon which our difference rests is, I believe, the point of public benefit; not the point upon the preponderance of public benefit, but the question, what might be taken into consideration as matter of public benefit?" Lord Tenterden differed from the other judges, not as to the principle sanctioned by Lord Hale, that the jury are to consider, upon a view of all the cir-

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cumstances, whether or not the benefit to the public preponderates over the injury, but merely as to an ingredient in that preponderance, namely, the convenience afforded to the trade of London. [COLERIDGE, J. Lord Tenterden said there (p. 602) that the question raised by the indictment was properly, whether the navigation and passage of vessels on the public navigable river was injured by these erections.] The general principle of compensation has scarcely been disputed in this case; but the compensation is said to be too remote and indirect. It has, indeed, been said that there can be no compensation for a crime; but the question here is, whether any crime has been committed; and the crime in question is nuisance to the port. [ERLE. The indictment is for obstructing a navigable river and king's highway.] It adds the words, "called Cowes Harbor." And the mere wording could not alter the question whether or not a nuisance to the port had been committed. The concluding part of the address to the jury by Bayley, J., in *Rex v. Russell*, 6 B. & C. 593, is thus stated by Holroyd, J.: "If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown." It is sufficient to contend, here, that the last part of the alternative was correctly put. And Lord Tenterden said afterwards, (6 B. & C. 602,) "the question raised by this indictment" "I take properly to have been, whether the navigation and passage of vessels on this public navigable river was injured by these erections. Upon this question there was evidence on both sides, regard being had to that obstruction, which must necessarily take place by the transfer of coals from keels or other vessels confined to the navigation of the river, into ships of a different kind passing to sea. And if the question had been left entirely in this form, and a verdict found for the defendants, I do not, as at present advised, see that any objection could have been properly made to it. In some parts of my learned brother's direction to the jury, and especially toward the close, the case appears to have been left mainly on this ground. But in other parts, remarks were made on the public benefit of the nature that I have alluded to, which might probably, in my judgment, have an effect upon the minds of the jury, coming as they did from so high and from so respectable an authority, that I think ought not to have been produced." Lord Tenterden nowhere intimates an opinion that a verdict ought to be entered for the Crown; and yet the fact of obstruction was more unequivocal in that case than in the present. The argument at the bar, there, had turned mainly upon the point that the alleged compensation did not take effect in the

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proper quarter. In *Rex v. Pease*, 4 B. & Ad. 30, (though it is not necessary to assimilate the case of a port to that of a high road,) the principle, if rightly applied, of compensation, seems to have been held reasonable at least. And here it is not questioned that there was a compensation to the public frequenting the harbor of Cowes for the impediment created in the harbor by the defendant's causeway.

Lord DENMAN, C. J. My understanding at the trial certainly was, that the question was much the same as that in *Rex v. Russell*, 6 B. & C. 566, a case, the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined. Lord Tenterden there did not accede to the doctrine of compensation laid down by Bayley, J., in his direction to the jury, nor does Holroyd, J., appear to have adopted it. And I must say that, if the violation of rights which belong to any part of the public is to be vindicated by the benefit which may arise to another part of the public elsewhere, we are introducing inquiries of a most vague and unsatisfactory nature, and entering into speculations upon which no jury can be properly expected to decide. However, the defendant's counsel have, in this argument, proceeded upon a narrower ground than that taken in *Rex v. Russell*, 6 B. & C. 566.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the nature of the indictment, and the principal facts of the case, the questions left to the jury, and the verdict, (for which see page 1-3, *ante*,) his lordship proceeded as follows:—

Sir William Follett obtained a rule of this Court for entering a verdict of Not Guilty, on the ground that the finding amounts to an acquittal. And this conclusion would probably be found irresistible, if the case of *Rex v. Russell*, 6 B. & C. 566, was well decided by the majority of this Court, or rather if the direction of the learned Judge who tried that indictment, correctly laid down the law.

That learned Judge concluded his address to the jury in these terms:—

“If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown. If on these points you are of a different opinion, then for the defendants.” In substance, therefore, it should seem that the jury were directed to find the defendant Not Guilty, if his act, indicted as a nuisance, were productive of more public benefit than public inconvenience.

The greatest weight is due to the authority of Mr. Justice Bayley, who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent Judge to Mr. Justice Holroyd, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But, when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing up; on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant's prejudice, by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing up, and even to its close, by its connection with that argument. Mr. Justice Bayley himself, who delivered his judgment after Mr. Justice Holroyd, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for an example the purchasers of coals, sent from the indicted staith to a distant market. Lord Tenterden thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, "whether the navigation and passage of vessels over this public navigable river was injured by those erections."

Lord Tenterden's dissent must be allowed to detract greatly from the authority to be ascribed to the direction given at *Nisi Prius*, which his lordship was evidently anxious to sustain if possible: and, when it appears that Holroyd, J., founds his support of the direction on a distinction which excludes the general principle now contended for and avowed by Bayley, J., the case of *Rex v. Russell*, 6 B. & C. 566, will appear to rest on the single authority of that learned Judge, acting at *Nisi Prius*, and satisfied on reflection with the course which he had then taken. It is observable also that of the distinguished counsel who opposed the rule for a new trial in *Rex v. Russell*, 6 B. & C. 566, and who have addressed us on the present occasion, none have maintained that the direction there given was altogether conformable to law.

If indeed it were, we may well feel some surprise that the doctrine appears there for the first time; certainly no trace of it has been discovered in any law-book of an early date, but the cases quoted from Cro. Car. and Salkeld, display a strong repugnance to it. The first glimpse of it is detected in some expressions employed by Lord Tenterden, in *Rex v. Earl Grosvenor*, 2 Stark. N. P. C. 514. His lordship there lays it down, that "the public have a right to all the convenience which the former state of the river afforded, unless by the

change some greater degree of convenience is rendered." Vessels are entitled, he says, to the advantage of shelter, "unless the want of it be compensated by some superior advantage resulting from the alteration." Hence it is inferred that, if the public had derived any new convenience from the change, which a jury should think greater than that which the nuisance took from them, or if some advantage superior to that of shelter had resulted from the destruction of that shelter, his lordship would have directed an acquittal. But this by no means follows; for all who have studied the course adopted by that learned and cautious judge are well aware that his habit never was to lay down a larger proposition of law than the case in hand required. It is evident that, in *Lord Grosvenor's case*, which was that of an embankment raised by an individual for his own profit, the only question which he thought necessary to be submitted to the jury, — namely, whether the public had benefited by the alteration made, — was plainly confined to such benefits as the public might have derived from it, in the exercise of that very right, the invasion of which was treated as a nuisance. If he had contemplated the doctrine of *Rex v. Russell*, 6 B. & C. 566, he would have told the jury to consider whether that part of the public which consisted of the frequenters of the wharf had not gained more than the navigating part of the public had lost, by means of the erection made. But even if the language employed had comprehended in its terms all possible modes of compensation, Lord Tenterden's judgment in *Rex v. Russell*, 6 B. & C. 566, plainly shows what his deliberate view of the law was, and that the advantage gained ought to be closely connected with the inconvenience resulting; or rather with that which would have been an inconvenience if it were not absorbed in the superior advantage. This is most apparent, from what is ascribed to him in p. 602.

In this view of the law my brother Littledale authorizes me to say that he fully agrees, though his connection, when at the bar, with the case of *Rex v. Russell*, 6 B. & C. 566, induced him to take no part in that decision.

And in the infinite variety of active operation always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of

being compelled to compensate any portion of the public which may suffer for their advantage.

In the recent argument, the doctrine of compensation for nuisance was supported by one analogy only. Mr. Bere, comparing the right of navigation over a waterway to that of walking along the street, observed that the latter was sometimes interrupted by the exercise of other rights, as when a hoard is erected for repairing a house. But it rather appears that the hoard is placed for the safety of those possessing the right of way; it protects them from inevitable danger if it leaves them a free passage, and sends them another way if the whole street is necessarily obstructed. Every way to which houses adjoin must be considered as set out subject to these occasional interruptions, which resemble the temporary acts of loading coals in keels, alluded to in *Rex v. Russell*, 6 B. & C. 566. A permanent hoard would be abatable as a nuisance; and it much resembles the staith in *Rex v. Russell*, 6 B. & C. 566, the wharf in *Lord Grosvenor's case*, 2 Stark. N. P. C. 511, and the quay, for which this indictment was preferred.

But the learned counsel contended that they did not want the authority of *Rex v. Russell*, 6 B. & C. 566, and could establish their right to a verdict of Not Guilty, on the finding of the jury, from a consideration of the nature of the place where the nuisance is charged. They say that the River Medina, as described in the indictment, is not merely a navigable river but a port, Cowes Harbor, and they rely on the various rights that may exist together in such a place, and their unavoidable inconsistency at particular times. The same remark may, however, be true, with respect to a highway, where right of common of pasture, and right of common of turbary, may exist at the same time. It is still more strikingly true in respect of navigable rivers, from which it seems impossible to distinguish the case of ports, in principle, though the degree may perhaps be different. Where such rights happen to clash in questions brought before the courts, the valuable maxim, *sic utere tuo ut alienum non lædas*, will generally serve as a clue to the labyrinth.

But the possible jarring of preëxisting rights can furnish no warrant for an innovation which seeks to create a new right, to the prejudice of an old one. There is no legal principle to justify this proceeding, unless *Rex v. Russell*, 6 B. & C. 566, is well decided.

Recourse is then had to the great and venerable name of Hale, from whose excellent treatise *De Portibus Maris*, p. 85, some such words as the following may be extracted. It is not every building below the high-water mark, that is, *ipso facto*, in law a nuisance, for that would destroy all the quays that are in all the ports of England. For they are built below the high-water mark, for otherwise vessels

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could not come at them to unload, and some are built below the low water. And it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if, *ipso facto*, it were a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the waters may flow in shallows where it is impossible for vessels to ride.

But Hale, in this passage, is only disputing the doctrine "that every building below the low-water mark is, *ipso facto*, in law, a nuisance;" which his observation on existing quays, and on such as may have been created under the king's license, effectually disproves; and the argument is strengthened by the fact that, in some cases, such buildings are essential to the harbor being navigated at all. Here is no question of balancing nuisances; nor was the position intended to affect the general rule laid down by the same great authority at page 9 of the same treatise, that "all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments." There is no incongruity in his afterwards asserting that the question of nuisance or no nuisance is for the jury; so Lord Tenterden considered it in *Rex v. Russell*, 6 B. & C. 566, and gave the form in which he thought it ought to be submitted to them; and that is precisely the course taken on the trial of this indictment.

The jury, having answered my inquiry in the affirmative, have plainly found a verdict for the Crown, unless their added statement entitled the defendant to an acquittal. For the reasons given, we think it did not, and that the present rule must therefore be discharged.

*Rule discharged.*¹

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths therein, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage occasioned by these

¹ The indictment in the present case was as follows.

1st Count. That the River Medina, otherwise called Newport River, is, and from time whereof &c. was, an ancient navigable river and common king's highway for all the liege subjects of our Lord the King with their vessels, boats, lighters, barges, and craft, to pass, repass, and navigate at their free will and pleasure, to wit, at the borough of Newport, in the Isle of Wight, in the county of Southampton; and that George Henry Ward, late of &c., Esquire, on the 1st day of July in the fourth year &c., 1833, with force, &c., at the borough aforesaid, in a certain part of the said navigable river and common king's highway, called Cowes Harbor, in and upon the bed and soil of the same, and in the stream and waterway thereof, unlawfully, wilfully, knowingly, and injuriously, did erect, raise, and place, and cause to be erected and

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staiths, was for a public purpose, and occasioned a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of

placed, a certain building composed of stones, timber, and other materials, of great length and width, namely, of the length &c., and of the width &c., projecting into and across the stream and waterway of the said navigable river and king's highway: and the said building, so as aforesaid erected, raised, and placed in the said river and common king's highway there, from the said 1st of July until the day of taking this inquisition, at &c. aforesaid, the said G. H. W. then and there unlawfully, &c., did continue, and still doth continue. By reason whereof the liege subjects, &c., during all the time aforesaid, could not, nor can they now, pass and repass and navigate with their vessels, boats, lighters, barges, and craft in and along the said river and common king's highway, as freely as they before used and were accustomed to do, and still of right ought to do. To the great damage and common nuisance of all the liege subjects &c. in and along the said river and common king's highway there passing and repassing and navigating with their vessels, &c., as aforesaid; to the evil example, &c., and against the peace, &c.

2d Count. That G. H. W. afterwards, to wit, on &c., at &c., unlawfully, &c., did raise, erect, and place, and cause to be raised, &c., a certain embankment composed of gravel, earth, &c., and other materials, in and upon the soil and bed of the said river, called the River Medina or Newport River, and common king's highway there, in the stream and waterway of the same, of great length, height, and width, to wit, &c., projecting into, and athwart and across the stream and waterway of the same navigable river and king's common highway; and the said embankment so as aforesaid erected, raised, and placed, from &c. until &c., to wit, at &c., he, the said G. H. W., unlawfully, &c., did continue, and still does continue, to the great damage, &c.

3d Count. That G. H. W. afterwards, to wit, &c., and on divers other days &c., with force &c., at Cowes Harbor, within the borough aforesaid, unlawfully, designedly, and injuriously did place and drive, and caused to be &c., divers, to wit, fifty posts to and into the bed and soil of the said navigable river and common king's highway, and did cast and throw, and cause to be &c., divers large quantities of stone, gravel, &c., into and upon the bed, stream, course, and waterway of the said river and common king's highway there, to wit, 200 vessel loads, &c., thereby forming a certain other great mound, slipway, and embankment, projecting and extending into the bed, stream, and waterway of the said river and common king's highway there, to a great length, height, and width, to wit, the length &c., into the same river and common king's highway, to wit, at Cowes Harbor, &c., whereby and by means whereof, the bed, stream, course, and waterway of the said river and common king's highway there, was during all the time aforesaid, and still is, greatly obstructed, impeded, straitened, and narrowed, and rendered less safe and commodious to the liege subjects &c., in and upon the said river and common king's highway there passing, repassing and navigating with their vessels, &c., than the same otherwise would have been, and of right ought to have been and to be, to wit, at &c., to the great damage, &c.

4th Count. That the said G. H. W., to wit, on &c., and on divers other days &c., with force &c., at the borough aforesaid, unlawfully, &c., did cast and throw, and cause and procure to be &c., divers large quantities of earth, &c., into the said river and common king's highway there, to wit, 200 cart loads, &c., whereby and by means whereof the said river and common king's highway there was during all the time aforesaid, and still is, greatly obstructed, &c. (conclusion as in the preceding count.)

5th Count. That the said G. H. W., on &c., and from thence continually until &c., with force &c., at Cowes Harbor within the borough aforesaid, in, upon, and across a

 Nuisance — Compensation for, no Defence to an Indictment.

the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was holden that this direction was right. *Rex v. Russell*, 6 Barnewall & Cresswell, 566; 9 Dowling & Ryland, 566, Lord Tenterden, C. J., *dissentiente*. But this doctrine is overruled by *Rex v. Ward*. In *Respublica v. Caldwell*, 1 Dallas, 150, it was held that a defendant will not be permitted to show in defence, that the public benefit resulting from his act is equal to the public inconvenience which arises from it. See also *Regina v. Randall*, Carington & Marshman, 496; *Commonwealth v. Belding*, 13 Metcalf, 10. But it seems that such evidence may be admitted to the court, in mitigation of a discretionary fine or penalty. *The State v. Bell*, 5 Porter, 365.

The building of a bridge, or of a wall or embankment, partly in the bed of a navigable river, does not necessarily constitute a nuisance; the question whether in fact it is so or not in the particular instance is for a jury; and where the verdict of the jury negatives any actual obstruction, that is in effect an acquittal. *Regina v. Betts*, 16 Queen's Bench Rep. 1022; 22 Eng. Law and Eq. Rep. 240; 4 Cox, C. C. 211. See *Regina v.*

Charlesworth, 16 Queen's Bench Rep. 1012; 22 Eng. Law and Eq. Rep. 235; 5 Cox, C. C. 174; 4 New Sessions Cases, 703. Where the judge at the trial asked the jury whether they thought the erection would be "a material nuisance;" in which case they were to find a verdict of guilty; but told them that if they thought the "nuisance" was so slight, uncertain, and rare, that the defendant ought not to be made criminally liable for it, they should acquit him; and the jury saying that they considered the erection, "although a nuisance, was not sufficiently so to render the defendant criminally liable," he directed an acquittal; the court held that the charge was to be understood as meaning not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction in question was so insignificant; and so that there was not a misdirection which would warrant a new trial. *Regina v. Russell*, 3 Ellis & Blackburn, 942; 26 Eng. Law and Eq. Rep. 230. See *Rex v. Tindall*, 6 Adolphus & Ellis, 143; 1 Neville & Perry, 719; Archbold, Crim. Pl. (London ed. 1856.) 755. H.

certain navigable river and common king's highway, called the Medina River, there situate, divers, to wit, ten other walls, ten other banks, 100 other posts, 500 pieces of timber, ten other slipways, ten other wharfs, and ten other embankments, before then unlawfully, wrongfully, and injuriously erected, built, and set up, in, upon, and across the said last-mentioned navigable river and common king's highway, unlawfully, &c., did keep and continue, and still doth keep and continue, by means whereof the said last-mentioned navigable river and common king's highway is greatly obstructed, straitened, and narrowed, to wit, at the borough aforesaid, to the great damage, &c.

REGINA v. THURBORN.¹

April 30, 1849.

Larceny — Lost Property — Animo Furandi.

If a man find lost property without any marks indicating the owner, and without any circumstances attending the finding which would enable him to discover the owner, he does not become guilty of larceny by subsequently appropriating the property to his own use after he has ascertained the owner; although he intended to keep the property when he first picked it up.

THE prisoner was tried before PARKE, B., at the Summer Assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating who was the owner, nor were there any circumstances attending the finding, which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use, when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe it to be the prosecutor's property, before he thus changed the note. The learned baron directed a verdict of guilty, intimating that he should reserve the case for further consideration. Upon conferring with Maule, J., the learned baron was of opinion that the original taking was not felonious, and that, in the subsequent disposal of it, there was no taking, and he therefore declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April, A. D. 1849, the following judgment was read by

PARKE, B. A case was reserved by Parke, B., at the last Huntingdon assizes. It was not argued by counsel, but the judges who attended the sitting of the court after Michaelmas Term, 1848, namely, the L. C. Baron, Patteson, J., Rolfe, B., Cresswell, J., Wil-

¹ 1 Denison, C. C. 387, and 3 Cox, C. C. 453, under the name of *Regina v. Wood*.

Larceny — Lost Property — *Animo Furandi*.

liams, J., Coltman, J., and Parke, B., gave it much consideration, on account of its importance and the frequency of the occurrence of cases in some degree similar, in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. [The learned baron here stated the case as before set out.]

In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose; by the term *animo furandi* is to be understood the intention to take, not a partial and temporary, but an entire dominion over the chattel, without a color of right. As the rule of law, founded on justice and reason, is, that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him, and the crime of larceny cannot be committed, unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.

In the earliest time it was held, that chattels, which were apparently without an owner, "*nullius in bonis*," could not be the subject of larceny. Stamford, one of the oldest authorities on criminal law, who was a judge in the reign of Philip and Mary, says, (B. 1, ch. 16,) "Treasure trove, wreck of the sea, waif or stray, taken and carried away, is not felony." "*Quia dominus rerum non apparet, ideo cujus sunt incertum est.*" For this he quotes Fitz. Abr. Coron. p. 187, 265; these passages are taken from 22 Ass. 99; 22 Ed. 3, and mentioned only "treasure trove," "wreck," and "waif," and Fitzherbert says the punishment for taking such is not the loss of life or limb. The passage in 3 Inst. 108, goes beyond this; Lord Coke mentions three circumstances as material in larceny. First, the taking must be felonious, which he explains; secondly, it must be an actual taking, which he also explains; and, thirdly, "it is not by trover, or finding;" he then proceeds, as follows: "If one lose his goods, and another find them, though he convert them '*animo furandi*,' to his own use, it is not larceny, for the first taking is lawful. So if one find treasure trove, or waif or stray, (here wreck is omitted and stray introduced,) and convert them *ut supra*, it is no larceny, both in respect of the finding, and that '*Dominus rerum non apparet.*'" The only authority given is that before mentioned, 22 Ass. 99; 22 Ed. 3.

Now treasure trove and waif seem to be subject to a different construction from goods lost. Treasure trove is properly money supposed to have been hidden by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the crown; as to waif, the original owner loses his right to the property

Larceny — Lost Property — *Animo Furandi*.

by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted, show that they could not be taken from any one, there being no owner. Wreck and stray are not exactly on the same footing as treasure trove and waif; wreck is not properly so called, if the real owner is known, and it is not forfeited until after a year and a day.

The word "estray" is used in the books in different senses, as may be seen in *Com. Dig. Waife, F.*, where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge, after being proclaimed, where the property vests in the crown, or its grantee of estrays; and also of cattle straying in the manor, before they are so forfeited. Blackstone, Vol. II. 561, (Stephens's ed.,) defines estrays to be "such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the sovereign." In the passage in Stamford no doubt the word is used, not exclusively in the former sense, but generally as to all stray cattle, not seized by the lord. Now treasure trove and waif, properly so called, are clearly "*bona vacantia, nullius in bonis*," and, but for the prerogative, would belong to the first finder absolutely. "*Cum igitur thesaurus in nullius bonis sit, et antiquitus de jure naturali esset inventoris, nunc de jure gentium efficitur ipsius domini regis.*" Bracton, *Coron. L. 3, c. 3, p. 126*. Wreck and stray, in the sense we ascribe to those words, are not in the same situation, for the right of the owner is not forfeited until the end of a year and a day; but Lord Coke, in *Constable's case*, 5 Rep. 108 a, treats wreck also as "*nullius in bonis*;" and estrays, "*animalia vagantia*," he terms "*vacantia*," because none claims the property. Wreck and stray, however, before seizure, closely resemble goods lost, of which the owner has not the actual possession, and afford an analogy to which Lord Coke refers in the passage above cited. Whether Lord Coke means what the language at first sight imports, that under no circumstances could the taker of the goods really lost and found be guilty of larceny, is not clear; but the passage is a complete and satisfactory authority, that a person who finds goods which are lost may convert them, *animo furandi* under some circumstances, so as not to be guilty of larceny. The two reasons assigned by him are, that the person taking has a right in respect to the finding, and also that they are apparently without an owner, "*dominus rerum non apparet*," an owner, or the owner does not appear.

The first of these reasons has led to the opinion, that the real meaning of Lord Coke was not that every finder of lost goods, who takes *animo furandi*, is not guilty of felony, but that if one finds, and innocently takes possession, meaning to keep for the real owner,

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and afterwards changes his mind and converts to his own use, he is not a felon, on the principle that Lord Coke had previously laid down, namely, that "The intent to steal must be when the thing stolen cometh to his possession; for if he hath the possession of it once lawfully, though he hath *animum furandi* afterwards, and carrieth it away afterwards, it is no larceny;" and Lord Coke also cites Glanville, "*Furtum non est ubi initium habet detentionis per dominium rei.*" It is said, therefore, that the case of finding is an instance of this — beginning with lawful title, which consequently cannot become a felony by subsequent conversion; but if it be originally taken not for the true owner, but with intent to appropriate it to his own use, it is a felony, and of this opinion the commissioners for the amendment of the criminal law appear to have been, as stated in their first report.

This opinion appears to us not to be well founded, for Lord Coke puts the case of lost goods on the same footing as waif and treasure trove, which are really *bona vacantia*, goods without an owner, and with respect to which, we apprehend that a person would not be guilty of larceny, though he took originally *animo furandi*, that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them, and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of or by contract of the owner. But any doubt on this question is removed by what is said by Lord Hale, 1 P. C. 506: — "If A. find the purse of B. in the highway, and take and carry it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying or secreting it, yet it is not felony. The like in taking of a wreck or treasure trove," (citing 22 Ass. 99,) "or a waif or stray." Lord Hale clearly considers, that if lost goods are taken originally *animo furandi*, in the sense above mentioned, the taker is not a felon; and when it is considered that, by the common law, larceny to the value of above twelve pence was punishable by death, and that the quality of the act in taking *animo furandi* goods from the possession of the owner, differs greatly from that of taking them when no longer in his possession, and *quasi derelict*, in its injurious effect on the interests of society (the true ground for the punishment of crimes,) it is not surprising that such a rule should be established, and it is founded in strict justice; for the cases of abstraction of lost property being of rare occurrence, when compared with the frequent violations of property in the possession of an owner, there was no need of so severe a sanction, and the civil remedy might be deemed amply sufficient. Hawkins, B. 1, ch. 19, s. 3, Curwood's ed., says: "Our law, which punishes all theft with death, if the thing stolen be above the value of twelve pence,

and with corporal punishment if under, rather chooses to deal with them (*e. g.*, cases of finding, and of appropriating by bailees,) as civil than criminal offences; perhaps for this reason, in the case of goods lost, because the party is not much aggrieved where nothing is taken but what he had lost before." It cannot, indeed, be doubted that if, at this day, the punishment of death was assigned to larceny, and usually carried into effect, the appropriation of lost goods would never have been held to constitute that offence, and it is certain that the alteration of punishment cannot alter the definition of the offence. To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost; that is, that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore, if a horse is found feeding on an open common, or on the side of a public road, or a watch found apparently hidden in a haystack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them, and, consequently, had no right to treat them as lost goods. In the present case, there is no doubt that the bank note was lost; the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore though he took it with the intent not of taking a partial or temporary, but the entire dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, "*Quia Dominus rerum non apparet ideo cuius sunt incertum est,*" and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been generally adopted in practice, and we must, therefore, consider it to be the established law. There are many reported cases on this subject. Some where the owner of goods may be presumed to be known, from the circumstances under which they are found; amongst these are included the cases

of articles left in hackney coaches by passengers, which the coachman appropriates to his own use; or a pocket-book found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases, the appropriation has been held to be larceny. Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or *derelect*. Some cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wynne's case*, 1 Leach, C. C. 460; but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, checks, or bills, with the owner's name upon them. This subject was considered in the case of *Merry v. Green*, 7 M. & W. 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article — a check, for instance — with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then, as soon as he knew whose it was, took it *animo furandi*; as, in order to constitute a larceny, the taking must be a trespass, and it was asked when, in such a case, the trespass was committed? In answer to that inquiry, the *dictum* attributed to me in the report was used; that, in such a case, the trespass must be taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use *animo furandi*. It is quite a mistake to suppose, as Mr. Greaves has done, (Vol. II. c. 14,) that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W., which, taken alone, seems to be applicable to every case of finding unmarked as well as marked property. It was meant to apply to the latter only.

The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that

Larceny — Lost Property — *Animo Furandi*.

the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case; the first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and, therefore, the original taking was not felonious; and if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner; for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was punishable, as we have already decided; and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case more than the others, and, consequently, no larceny. We therefore think that the conviction was wrong.¹

¹ See the next case.

 Larceny — Lost Goods — Taking.

REGINA v. PRESTON.¹

November 22, 1851.

Larceny — Lost Goods — Taking.

Upon the trial of an indictment for stealing a bank note, which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the prisoner knew the owner, or had reasonable ground for believing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if, at that time, he had not that knowledge or belief, he was not guilty: —

Held, a misdirection; because if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny.

THE following case was reserved by the Recorder of Birmingham: —

Michael Preston was tried before me, at the last Michaelmas Sessions for the borough of Birmingham, upon an indictment which charged him in the first count with stealing, and in the second count with feloniously receiving, a £50 note of the Bank of England. It was proved that the prosecutor, Mr. Collis, of Birmingham, received the note in question, with others, on Saturday, the 18th of October, from a Mr. Ledsam, who, before he handed it to the prosecutor, wrote on the back of it the words, "Mrs. Collis." It was further proved that Collis was a very unusual surname in Birmingham, and almost, if not quite, confined to the family of the prosecutor, a well-known master manufacturer. About four or five o'clock the same afternoon, the prosecutor accidentally dropped the notes in one of the public streets of Birmingham, and immediately gave information of his loss to the police, and also caused hand-bills, offering a reward for their recovery, to be printed and circulated about the town. On Monday, the 20th, about three o'clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard any thing of them, he would let the police

¹ 8 Eng. Law & Eq. R. 589; 5 Cox, C. C. 390; 2 Denison, C. C. 353. Before LORD CAMPBELL, C. J., ALDERSON, B., PLATT, B., TALFOURD, J., and MARTIN, B. See the preceding case.

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know. He also inquired if the policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o'clock on the same afternoon, the prisoner went to the shop of Mr. Nickley, in Birmingham, and, after inquiring if he (Nickley) had heard of the loss of a £50 note, stated that he (the prisoner) thought he knew parties who had found one, and he asked Nickley whether the finders would be justified in appropriating it to their own use, to which Nickley replied that they would not. At four o'clock the same afternoon the prisoner changed the note, and was, later in the same evening, found in the possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts. He was then taken into custody, and on the following day, October 21, stated to a constable that when he was alone in his own house, on Sunday, a tall man, whom he did not know, came in and offered him a £50 note, for which he (the prisoner) gave him fifty sovereigns. The police officers previously told the prisoner, that they were in possession of information that one Tay, who was known to the prisoner, had found the note, but Tay was not called, nor was any evidence given as to the part (if any) which he took in the transaction. Upon these facts, I directed the jury that the important question for them to consider was, at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion, that the prisoner either knew the owner or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner or had a reasonable belief that the owner could be found, then he was not guilty of larceny. I also told the jury, that there was no evidence of any other person having possession of the note after it was lost except the prisoner; but that, even though the prisoner might not be the original finder, still, if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his use, after he knew the owner or reasonably believed that the owner could be found, he would be guilty of larceny. The jury found the prisoner guilty upon the first count, and I request the opinion of the judges as to the validity of the conviction. The prisoner was discharged on the recognizances of himself and two sureties, to appear and receive judgment at the next sessions.

O'Brien, for the prisoner. The direction of the learned recorder

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was wrong. To constitute larceny, there must be a trespass; and there is no trespass if the prisoner acquires possession lawfully in the first instance. This direction makes the question of larceny or no larceny depend upon the formation of a dishonest intention in the mind of the prisoner, after he has acquired the means of ascertaining the owner. That is contrary to all the authorities collected and commented upon in *Regina v. Thurborn*, 1 Den. C. C. 387; s. c. nom. *Regina v. Wood*, 3 Cox, C. C. 453, where Parke, B., observes: "The result of these authorities is, that the rule of law on this subject seems to me to be, that if a man find goods that have actually been lost, and appropriate them with the intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would, probably, be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case, the first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note, as proved that he believed the owner could not be found, and, therefore, the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was

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dispunishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not, therefore, a trespass in this case more than the others, and, consequently, no larceny." Again, in *Merry v. Green*, 7 M. & W. 623, 632, the same learned judge remarked: "It is said, that the offence cannot be larceny unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems, also, from *Wynne's case*, 1 Leach, 413; 2 East, P. C. 664, that, if under the like circumstances he acquire possession and mean to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny." The latter part of that sentence is qualified by a passage in the judgment in *Thurborn's case*, where the learned judge says: "Some of the cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wynne's case*; but it seems difficult to apply that doctrine, which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding."¹ The cases of *Rex v. Leigh*, 2 East, P. C. 694, and *Rex v. Mucklow*, 1 Moo. C. C. 160, are also strong to show that the *animus furandi* must exist at the time of the original taking. In the former, the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession. The jury, finding that she took them originally merely from a desire of saving them for and returning them to the prosecutor, and that she had no evil intention till afterwards, the judges held that it was a mere breach of trust, and not a felony. In the latter case, the defendant, to whom a letter, addressed to a person of the same name, was delivered by mistake, opened it, and appropriated to his own use the bill of exchange which it contained; yet it was held no larceny, because at the time when the letter was delivered to him he had no *animus furandi*.

Bittleston, for the Crown. The case of *Regina v. Thurborn* was brought under the consideration of the recorder; and, construing his

¹ *Wynne's case*, was that of a hackney coachman, who abstracted the contents of a parcel left in his coach by a passenger.

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direction with reference to the facts stated, it does in substance follow the rule there laid down. It only means that the prisoner would be guilty of larceny, if, when he first took complete possession of the note *animus furandi*, he then knew or had the means of knowing the owner.

[ALDERSON, B. The direction does not exclude the supposition, that the prisoner in the first instance received the note with an honest intention, but afterwards altered his mind, and in a day or two resolved to appropriate it to his own use. But my brother Parke, in *Thurborn's case*, decided that the dishonest intention must exist as soon as the finder has taken the chattel into his possession so as to know what it is.]

It is conceded that the very first moment of taking is not that at which the *animus furandi* and knowledge of the owner must exist to constitute larceny; because the chattel must be taken into the hand to ascertain what it is. The original possession, therefore, must necessarily be lawful in every case; and if the dishonest intention arising at the next minute may make the finder guilty of larceny, why may not the same dishonest intention arising afterwards have the same effect? What is a proper time for examining the thing may vary in different cases; and if a man takes time to make inquiries, for the purpose of satisfying himself whether he can keep the chattel without risk of discovery, and ultimately resolves to appropriate it, is he to be held not guilty of larceny, because he did not immediately make up his mind to deprive the owner of it? It is stated generally in the text-books, (1 Bl. Com. 295, 5th ed.,) that the finder of lost goods has a special property in them; and so, according to *Armory v. Delamirie*, 1 Stra. 505, he has against all but the true owner; but as against the true owner he has no property whatever, and it is submitted, at all events with regard to marked property, that as between the finder and the loser, the possession of the former is, in law, that of the latter, so long as the latter intends to act honestly. He holds merely for the true owner; he has a bare custody; but as soon as he resolves to appropriate the goods to his own use, he then converts that lawful custody into an unlawful possession; he commits a trespass; and is guilty of larceny, according to that class of cases where the owner, by delivering goods to the prisoner, does not part with the possession, but gives him the charge or custody of them only.

[ALDERSON, B. What do you say to that part of the direction which supposes that the prisoner was not the original finder?]

It makes no difference whether the prisoner himself picked up the lost note, or whether the person who did, brought it to him, and informed him of all the circumstances. That intermediate person

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might act with perfect honesty; and the prisoner, receiving it under those circumstances, would be in the situation of a finder.

[MARTIN, B. Suppose a man takes an umbrella by mistake, and, after keeping it for a few days, finds the owner, but does not return it, is there a felonious taking?]

LORD CAMPBELL, C. J. You must contend that there is.]

Yes, there would be no change in the possession until the dishonest intention arose.

[LORD CAMPBELL, C. J. Can there be a mental larceny?]

ALDERSON, B. There must be a taking, and it must be a taking *animo furandi*, but the taking and the intent are distinct things.]

In the cases of carriers, where the bailment is determined by breaking bulk, there is, in truth, no fresh taking. The carrier has possession of all the goods delivered to him for the purpose of carriage; but when he begins to deal dishonestly with them there is a constructive taking; and Parke, B., from the observation which he makes on *Wynne's case*, in *Merry v. Green*, seems to have thought so.

LORD CAMPBELL, C. J. I am of opinion that this conviction cannot be supported. Larceny supposes a taking *animo furandi*. There must always be a taking; but in the present case it is quite consistent with the direction of the learned recorder, that the prisoner might be guilty of larceny, though, when he took possession of it, with a full knowledge of the nature of the chattel, he honestly intended to return it to the owner whensoever he should be found; because he puts it, that the important question is, at what time the prisoner first resolved to appropriate it to his own use. But when was the taking? It is said, that whenever he changed his mind, and formed the dishonest purpose of appropriating the note to his own use, that then he took it constructively from the possession of the owner; but that dishonest purpose may have first come into his mind when he was lying in bed at a distance of many miles from the place where the note was. It seems to me that that operation of the mind cannot be considered a taking, and that, as there was no taking except the original taking, which might have been lawful, the conviction must be reversed. It is unnecessary to go into authorities upon this subject, after the elaborate judgment of my brother Parke, in *Thurborn's case*.

ALDERSON, B. In order to constitute larceny, there must be a taking as well as an intention to steal. The difficulty I feel in this case is, to know how a taking, honest at first, can be converted into a dishonest taking by the subsequent alteration of intention. It is clear, in this case, that the learned recorder left it open to the jury to convict the prisoner, even if they thought that at first he took the

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note honestly, but that he afterwards changed his mind, then knowing the owner; and it is argued, that the formation of the dishonest intention alters the character of the possession, though the taking may have been a week before; but I think that that is a degree of refinement which would destroy the simplicity of the criminal law.

The other judges concurred.

Conviction quashed.

To constitute the finder of property really lost guilty of larceny, two things must concur.

First. The finder must, at the time of finding, have the intention of feloniously appropriating the chattel to his own use.

Second. He must, at that time, either know the owner, or have the means of knowing him, or have reason to believe that he may be found.

1st. The felonious intent must exist *at the time of taking*. This is absolutely essential. The very definition of larceny, when carefully considered, necessarily implies this. "In order to constitute the crime of larceny," says Parke, B., in the principal case, "there must be a taking of the chattels of another *animo furandi*, and against the will of the owner." There must, therefore, be a taking *with* (i. e. accompanied with) a felonious intent, and both must exist at the same time. If, therefore, the finder of lost property carry it home, not then intending to steal it, but afterwards changes his mind, and either sells it or converts it to his own use, intending to keep it, he is not guilty of larceny, however censurable he may be in *foro conscientie*. See *Ransom v. The State*, 22 Connecticut, 153, (1852.) And it can make no difference that, in the interval between the finding and the subsequent appropriation, he actually learns who the owner is. This is distinctly brought out in the first leading case, and other decisions fully sustain the doctrine. One of the most recent and best considered cases on this subject is *Ransom's case*, above cited. In that case, the defendant found a pocket-book, and money in it, in the public highway, near a hotel. There was no mark upon the property indicating the owner, but the owner, about two hours after the loss, and about the time it was found, made known the fact

at the hotel, and offered a reward. The defendant used no means and made no inquiry to ascertain the owner, but concealed the fact that he had found it, and converted the property to his own use. The judge, before whom the case was tried, instructed the jury, that if the defendant, at the time he found the property, knew, or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, or if the defendant, at the time he found the property, did not know the owner, still, if he then determined to convert the property to his own use, and to deprive the owner of it at all events, even should he discover the owner before he so converted it, or any part of it, and afterwards concealed the property, and appropriated it to his own use, he was guilty of larceny. The prisoner was convicted under these instructions, but the verdict was afterwards set aside, and the principles laid down at the trial were declared incorrect; mainly, it seems, because the charge withdrew from the jury the question upon which the prisoner's guilt really depended, namely, whether the goods were originally taken by him with a felonious intention, and his guilt was made to depend on an intention which might have been formed subsequently. The conviction was made to depend on the question whether, with a knowledge or the means of knowledge as to the owner, the accused converted the goods to his own use after he first took them; and not upon the question whether, at the time of such taking, he intended so to convert them; and the case of *Regina v. Preston*, *ante*, 25, was cited and approved.

Earlier decisions had either expressly or tacitly proceeded upon the same doctrine. Thus, in *Milburne's case*, 1 Lewin, C. C. 251, (1829,) Bayley, J., told the jury,

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that in order to convict a prisoner who had taken up a coat left lying upon a stone by the roadside, that "they must be of opinion that, at the time the prisoner took the coat, he did so *animo furandi*." To the same effect is *Regina v. Breen*, 3 Crawford & Dix, C. C. 30, (1843.) In America, also, in *The People v. Anderson*, 14 Johnson, 294, (1817,) it was expressly held that the *bonâ fide* finder of lost property cannot be guilty of larceny by any subsequent felonious appropriation of it. If by *bonâ fide* finder the court in that case meant that the finder neither knew, nor had the means of ascertaining the owner at the time of finding, the case is entirely correct, both upon principle and authority. The facts were, that the prisoner found a trunk in the highway, which had fallen from a stage coach. He carried home the trunk, and appropriated the contents. It does not appear that the trunk was marked, or that the finder had any means of ascertaining the owner; if he had, the instruction of the chief justice to the jury was certainly right, and the final decision of the case was wrong. The jury were told, that if the prisoner first took the trunk with intent to steal, he was guilty of larceny; and, in forming their opinion upon that point, they had a right to take into consideration the subsequent conduct of the prisoner, as well as the other circumstances in the case. The jury found him guilty, and the verdict was set aside by the Supreme Court. The whole argument of the court above rests upon the idea that the fraudulent intent must accompany the taking, which is certainly true, and the judge below ruled precisely in accordance with this principle. But probably the case was rightly decided, as there is no indication that the finder ever knew the owner. Much is said in this and other cases about lost property not being the subject of larceny. If by that is meant such property cannot be stolen, it is entirely wrong. It is as much the subject of larceny as any property, and if the taking and fraudulent intent coexist with a knowledge of the real owner, the crime is complete. See *Ransom v. The State*, 22 Connecticut, 157, (1852.)

The courts in one State have erroneously held, in *Porter v. The State*, Martin & Yerger, 226, (1827,) and in subsequent cases, that a finder of lost property was not guilty of larceny, although he *knew the owner* at the time of finding, because he did not commit a trespass in obtaining possession of it. And the same false reasoning has led the same court to declare it no larceny for A. to fraudulently obtain possession of the property of B. under the pretence of hiring, but really with the then existing intention of stealing it, and afterwards selling it; and this because he obtained possession without a trespass. *Feller v. The State*, 9 Yerger, 297, (1836.) But both these decisions are certainly anomalous, and contrary to the elsewhere well-established rule of law.

The principle above laid down, that the felonious intent must exist at the time of finding, is also sustained by well-settled analogies; for if property of A. comes into the possession of B. in any manner, not amounting to trespass, and B. subsequently fraudulently appropriates it, but not having an intention to do so originally, it is not larceny, as many cases establish. Thus where the prisoner saved some of B.'s property from his house which was on fire, and took it home, but the next morning concealed it, and denied all knowledge of it; but the jury having found that she originally took it merely from a desire of saving it for the owner, and that she had no evil intention until afterwards, all the judges held this to be no larceny. *Rex v. Leigh*, 2 East, P. C. 694, (1800.) So where a letter was delivered to the prisoner by mistake, it being addressed to the same name as his own, and he opened it, and took out a bill of exchange, without knowing the mistake, but subsequently appropriated it to his own use, after he knew it did not belong to him, this was held no larceny, as there was no *animus furandi* when the bill was first received. *Rex v. Mucklow*, 1 Moody, C. C. 160, (1827.) So where A. borrows property for a special purpose, and after that purpose is accomplished neglects to return it, and afterwards disposes of it, this is not larceny, if A. had no felonious

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intention when he originally took the property. *Rex v. Banks*, Russell & Ryan, C. C. 441, (1821,) overruling the earlier cases *contra*; and see *Regina v. Steer*, 1 Denison, C. C. 349; 3 Cox, C. C. 187, (1848). So where property is bailed to a person, to carry or transport, and during the transit he fraudulently appropriates it, (not breaking bulk,) from a design not conceived until after the bailment commenced, this is not larceny. *Rex v. Reilly*, 1 Jebb, C. C. 51, (1826.) And, in like manner, where property is delivered to a mechanic to repair, and he receives it without any fraudulent intent, but afterwards resolves to appropriate it, and sells it as his own, this is not larceny. *Rex v. Levy*, 4 Carrington & Payne, 241, (1830); *Regina v. Thristle*, 3 Cox, C. C. 575, (1849.) Or where A. hires a horse with honest intentions, but afterwards sells him from want of money or other cause, and appropriates the proceeds, he is not guilty of larceny. *Regina v. Cole*, 2 Cox, C. C. 340, (1847.) Or where the horse of A. is delivered to B. to be kept, and B. afterwards sells it as his own. *Rex v. Smith*, 1 Moody, C. C. 473, (1836.) So, where a letter is given to a carrier to carry from A. to B., and he opens the letter on his way, and removes a bank note inclosed, but delivers the envelope, he is not guilty of larceny, if the jury find he had no intention of stealing the money when it was delivered to him. *Regina v. Glass*, 1 Denison, C. C. 219, (1847.)

The reader will, of course, easily distinguish these cases from those where the original possession was obtained by a *trespass*; for in such case a fraudulent appropriation, although not contemplated until after the property had been some time in the possession of the wrongdoer, is as much larceny as if the felonious intent existed at the reception of the property. *Regina v. Riley*, 14 Eng. Law & Eq. R. 544, (1853.)

We have said above, that the felonious intent must exist at the time of finding, and that if such intention is only an afterthought, no larceny is committed. It may be difficult to say how soon after the find-

ing this intent must take possession of the mind, but we think it should accompany and form a part of the first act of taking. A very delicate application of this principle occurred in *The State v. Roper*, 3 Devereux, 473, (1832.) There the prisoner found a shawl in a promiscuous assembly, and, picking it up in the sight of several persons, placed it where it could be seen, and left it there a few minutes, but leaning his body against it. No one claiming it, he took the shawl from where it hung, secreted it under his coat, and left the company, appropriating the shawl to himself. It was held, that unless the fraudulent intent existed in the prisoner's mind when he first picked up the shawl, he was not guilty of larceny by the subsequent appropriation of it, even though he knew the owner, or had the means of discovering her when he took the shawl from its place of deposit; because the shawl being in the prisoner's possession from the time he first took it up until he finally carried it away, and, consequently, there being no new taking in the last act, at which time the felonious intent first existed, the two things did not concur in point of time. The principle recognized in the case is clearly right; the application of it to the existing facts may, perhaps, be open to some doubt.

2d. The finder must, at the time of finding, either know the owner, or have the means of ascertaining him, or have reason to believe he can be found.

If the finder does know that he can find the owner, and takes away the property *animo furandi*, he is undoubtedly guilty of larceny. *Rex v. Pope*, 6 Carrington & Payne, 346, (1834); *The State v. Weston*, 9 Connecticut, 527, (1833,) where the prisoner, who could read, found a pocket-book in the highway, with the owner's name legibly written upon it in two places. The same principle was considered as beyond question in the case of *The State v. Ferguson*, 2 McMullen, 502, (1837,) and in *Rex v. Beard*, 1 Jebb, C. C. 9, (1822.) There the defendant found a check payable to *Robert King*, which he immediately afterwards presented to the bank for payment, declaring that he had

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received it from Mr. King, which being denied, he then said he received it from some unknown person, with instructions to collect. This was held by all the judges to be larceny, although the money was not in fact paid him.

But if there are no marks upon the property, or other *indicia* by which the owner can be found, the appropriation to the finder's use does not amount to larceny, although he knew the property was not his own. *Regina v. Mole*, 1 Carrington & Kirwan, 417, (1844); *Tyler v. The People*, 1 Breese, 227, (1829); *The State v. Conway*, 18 Missouri, 321, (1853); *The People v. Cogdell*, 1 Hill, 94, (1841); *Lane v. People*, 5 Gilman, 305, (1848.) And in both the last two cases, it was said the finder was not bound to take any means to discover the owner; he must know him immediately, from marks about the property, or otherwise; for if he ascertains the owner afterwards, and after he has for some time had possession of the property, he is not guilty of larceny, although he meant to keep the property when he first found it. This is clearly involved in the leading case, and in *Regina v. Preston*, *supra*. And so is the recent case of *Regina v. Dixon*, 7 Cox, C. C. 35, (1855,) where the prisoner found a purse of money in a public place, but which had no mark upon it by which its owner could be known, and although the jury found that the prisoner then believed that the owner could be traced, yet it was held that he could not be convicted of larceny. And if the finder knows, or has the means of knowing the owner, when he finds the article, and does not restore it, or seek to ascertain the owner, but converts the article to his own use, it is not larceny unless he *then* intended to deprive the owner of his property in the goods. Any subsequent fraudulent intention will not complete the crime of larceny. *The State v. Ransom*, 22 Connecticut, 153, (1852.)

If, however, the finder has reason to believe from the circumstances, or *place where the property is found*, that he knows or can find the owner, and he fraudulently appropriates it, he is guilty of lar-

ceny, although there were no marks of ownership on the article itself. *Regina v. Kerr*, 8 Carrington & Payne, 176, (1837,) where a servant found a roll of bank notes in a passage of her master's house, and did not inform her master, but denied she had the money. *Regina v. Peters*, 1 Carrington & Kirwan, 245, (1843,) where the prisoner found some personal jewelry in the prosecutor's garden, and took it away, with intent to appropriate it to his own use. *Lawrence v. The State*, 1 Humphreys, 228, (1839,) where a barber found a pocket-book on his table, which had been left by a customer, and took possession of it, and, when asked for it by the owner, denied all knowledge of it. And *Regina v. West*, 6 Cox, C. C. 415, (1854,) is precisely similar. *Cartwright v. Cartwright*, 8 Vesey, 406, (1802,) where a bureau was delivered by the owner to a carpenter to repair, and he finding money in a secret drawer, fraudulently appropriated it to his own use. *Merry v. Green*, 7 Meeson & Welsby, 623, (1841,) where it was held, that if the purchaser of a bureau finds money secreted in a private drawer, and fraudulently appropriates it to his own use, he is guilty of larceny, unless he had reasonable ground to believe that the bureau was sold *with its contents*. *The People v. McGarren*, 17 Wendell, 460, (1837,) where property was left by mistake in the prisoner's store, and he concealed it, and then denied all knowledge of it. *Wynn's case*, 1 Leach, C. C. 460; 2 East, P. C. 664, (1786,) where a coachman found a box on his coach, which he must have known belonged to a passenger whom he had carried. *Lamb's case*, 2 East, P. C. 664, (1694,) is to the same point. So where a servant of a railway company finds the property of a passenger accidentally left in a railway carriage, he is guilty of larceny if, instead of taking it to the station or superior officer, he appropriates it to his own use. *Regina v. Pierce*, 6 Cox, C. C. 117, (1852.) In each and all these cases, the property taken can hardly be considered *lost* property, but rather property left or mislaid, and therefore the rule of lost property would not apply. In *Prichett v. The State*, 2

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Sneed, 285, (1854,) the rule was declared to be, that if the owner knows where the property is, so that he would be able to recover the actual possession when he desired, if it had not been removed by the thief, then the property is not lost, and it may be the subject of larceny.

By statute in some States it is made the duty of finders of lost property to advertise it, or cause it to be publicly cried, &c. Rev. Stat. of Massachusetts, c. 56; Rev. Stat. of New Hampshire, c. 139; Rev. Stat. of Connecticut, pp. 624, 625; Rev. Stat. of Vermont, p. 415. And it has been held, that if the finder neglects to do so, and appropriated the property to his own use, he is guilty of larceny. *The State v. Jenkins*, 2 Tyler, 379, (1803.) And the language of some judges seems to imply, that making search for the owner is a common-law duty. [Thus, in *Regina v. Coffin*, 2 Cox, C. C. 44, (1846,) it was held to be larceny if a person finds lost property and appropriates it to his own use, without making endeavors, by advertisement or otherwise, to find the owner, although he was utterly ignorant of the owner at the time of the finding; unless he had reason to believe that the property was abandoned by the owner. See, also, the opinion of Coleridge, J., in *Regina v. Reed*, Carrington & Marshman, 307, (1842.) And the case of *Rex v. —*, 1 Crawford & Dix, C. C. 161, note, inclines the same way. But the cases of *The People v. Cogdell*, 1 Hill, 94, and *Lane v. The People*, 5 Gilman, 305, are entirely opposed to that doctrine. And it is very doubtful whether a mere neglect to ascertain the owner would constitute a finder of lost property, which has no marks or indications of the owner's name, guilty of larceny. And see *Ransom v. The State*, *supra*.

The only remaining point proposed to be considered is, what appropriation of the property by the finder is necessary, in order to make the felony complete. The finder may take it away with one of three motives: either to keep it and use it as

his own, intending to deprive the owner of it entirely; or, to keep it safely for him and return it when the rightful owner is ascertained; or, lastly, to keep it to see if a reward is offered, and then to return it upon payment of the reward. In the first case, there is no doubt he is guilty of larceny, and in the second it is equally clear he is not. In the latter case, it may not be so well settled. In some English cases, it has been considered larceny if the property was taken in order to exact a reward, and was not to be delivered up unless the reward was paid. *Regina v. Spurgeon*, 2 Cox, C. C. 102, (1846,) *Regina v. Peters*, 1 Carrington & Kirwan, 245, (1843.) On the other hand, in a more recent case, where the verdict was — "We find the prisoner not guilty of stealing the watch, but guilty of keeping it in hope of reward from the time he first had it," the whole Court in Exchequer Chamber held it to be no larceny. *Regina v. York*, 3 Cox, C. C. 181; 1 Denison, C. C. 342, (1848); and see *Regina v. Breen*, 3 Crawford & Dix, C. C. 30, (1843.) And if the finder of lost property, for which a reward has been offered, has a lien on the property for the reward, and is not liable for it in trover, until the loser tenders the reward, as was held in *Wentworth v. Day*, 3 Metcalf, 352, there seems to be good reason for the principle, that if property is lost for which a reward is offered, the finder may honestly take home the property, and keep it for the sake of securing the reward, and with a determination not to give it up until the reward is paid, without being guilty of larceny. But suppose lost property is found, and the finder takes it away, intending, if a reward is offered to return it and take the reward, and if not to keep it, what then, is he guilty of larceny or not? The opinion of the judge, in *Regina v. Spurgeon*, was, that it was larceny. But see *Regina v. Peters*, *supra*; *Regina v. Breen*, 3 Crawford & Dix, C. C. 30, (1843.)

E. H. B.

 Rights of Railroad Superintendents, Conductors, and Passengers.

COMMONWEALTH v. POWER.¹

September Term, 1844.

Rights of Railroad Superintendents, Conductors, and Passengers.

A railroad corporation has authority to make and carry into execution reasonable regulations for the conduct of all persons using the railroad or resorting to its depots, without prescribing such regulations by by-laws; and the superintendent of a railroad depot, appointed by the corporation, has the same authority, by delegation.

A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers or interrupt the officers and servants of the corporation in the discharge of their duties.

Where the entrance of innkeepers, or their servants, into a railroad depot, to solicit passengers to go to their inns, is an annoyance to passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, the superintendent of the depot may make a regulation to prevent persons from going into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and, after notice to leave the depot, refuse so to do, he and his assistants may forcibly remove them; using no more force than is necessary for that purpose.

If an innkeeper who has frequently entered a railroad depot, and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with the *bonâ fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery.

THIS was a complaint against the defendants, made to a justice of the peace, for an assault and battery upon Timothy Hall, on the 23d of March, 1844. The defendants appealed from the justice to the Court of Common Pleas. Trial before that court at the last June term. The judge before whom that trial was had made the following report thereof:

It appeared, that at the time of the alleged assault, &c., the defendant Power was master of the depot of the Western Railroad, at Pittsfield, and that the other defendants were servants of the Western Railroad Corporation: That said Hall, having in his pocket a ticket for his passage in the railroad cars from Pittsfield to Richmond, and having a *bonâ fide* intention to go to Richmond, entered said depot about the time of the arrival of the cars for Richmond, and was pro-

¹ 7 Metcalf, 596.

ceeding to the platform, for the purpose of entering a car: That said ticket had been procured by another person, and that neither the defendants nor any other agent of the said corporation knew that Hall had it, or that he intended to go to Richmond.

Said Power alleged in his defence, that Hall was going to the platform to solicit passengers to go to his house, he being the keeper of a tavern near the depot; that said Power met Hall on his way to the platform, told him he must not go there, laid his hands upon and ordered him to leave the depot, without any previous inquiry as to his purposes; that Hall made no reply, but pressed forward and endeavored to reach the platform in spite of the efforts of said Power, who thereupon ordered the other defendants to put him out of the depot; and that they accordingly took him, and forcibly put him out, not using any more violence than was necessary to accomplish that object.

It appeared in evidence, or was admitted on the part of the Commonwealth, that the innkeepers in the neighborhood of said depot had previously to this affair been in the habit of going, or sending their servants, to the platform, to solicit passengers, arriving in the cars, as customers to their several houses; and that Hall had personally, and by his servants, participated in this practice; that this practice had become a great annoyance to passengers; that said Power, having been placed by the railroad corporation in charge of the depot, had addressed a circular letter to said innkeepers, about two weeks before the said assault, stating the facts, and requesting them to discontinue said practice, and giving them notice that they would thereafter be excluded from the platform; that all of them, except Hall, discontinued the practice, but that he continued to go to the platform and solicit passengers; that said Power had forbidden him, a day or two before the said assault, to enter the depot at all; that notwithstanding this, Hall had again forced his way to the platform, when the cars were in, against the remonstrances and efforts of said Power, who again told him that he must not come to the depot any more.

On this evidence the defendants contended that they were justified in doing the acts complained of. The judge instructed the jury that the foregoing facts did not constitute a defence; and under said instruction, a verdict was returned against the defendants. But as the question of law in the case was, in the opinion of the judge, so doubtful as to require the decision of the Supreme Judicial Court, he made the foregoing report of the case, pursuant to the Rev. Sts. ch. 138, § 12.

R. A. Chapman and Colt for the defendants. Every proprietor of

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lands or buildings has a right to the control of them, and may put out other persons, after ordering them to remove. *Commonwealth v. Clark*, 2 Met. 25. Common carriers have the same right as others to the control of their premises. Though they cannot refuse to carry goods or passengers, without good cause, yet a passenger who is rejected, and *à fortiori* a person who does not claim the rights of a passenger, has not a right to remain on their premises against their will. Hall should have exhibited his ticket, or offered the fare, and claimed the rights of a passenger. See 2 Kent, Com. (3d ed.) 598; Bac. Ab. Carriers, B., Inns and Innkeepers, C. 3; *Spooner v. Baxter*, 16 Pick. 411.

If Hall ever had any right to go to the platform, (which is denied,) he had forfeited that right by his previous conduct, and the defendants, as agents of the corporation, were well warranted in removing him, while they had a reasonable apprehension that he would cause disturbance and annoyance. *Howell v. Jackson*, 6 Car. & P. 723; Story on Bailm. § 476; Chit. Gon. (5th Amer. ed.) 478. In *Markham v. Brown*, 8 N. Hamp. 523, it was held that the right of one to enter an inn, for the purpose of soliciting passengers for a stage coach, may be forfeited by his misconduct in disturbing the guests; and that an innkeeper may prohibit a stage agent from entering, until the ground of apprehension is removed. And in *Jencks v. Coleman*, 2 Sumner, 221, it was decided that proprietors of steamboats, though they are common carriers, may rightfully exclude persons from their boats, whose character, habits or purposes interfere with the proprietors' interests, and all persons who refuse to obey the reasonable rules prescribed for the regulation of the boats.

Bishop, for the Commonwealth. The law relied on for the defendants does not apply to the facts of this case. Exclusive right of possession of premises is necessary in order to justify a removal of others therefrom by force. One co-tenant, who obtains possession of the whole, has no right forcibly to keep out another tenant. A railroad corporation is not, strictly speaking, a private corporation, like a steamboat or stage company, whose property is wholly their own. It is a public corporation, and takes private property for public use. It has not exclusive possession of the track, depots, &c. as against individuals and the public. The public have a right there, and going there is not a trespass. Therefore, if Hall was not a trespasser, the defendants had no right to expel him by force. Can an agent of a turnpike road forbid any person to travel on it; or can he seize a traveller who violates a by-law against passing over a bridge faster than on a walk, and turn him off by force?

The Rev. Sts. ch. 44, §§ 1, 2, authorize corporations to establish

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by-laws, and prosecute for violations of them. But the railroad corporation has no by-law forbidding taverners and porters to crowd about the depots. A circular letter of the agent had been issued, without any authority from the corporation, and therefore was of no binding force.

But if Hall might rightfully have been excluded from the platform, by reason of his former conduct, yet he could not be legally excluded from the depot. He was seized before he reached the platform. One may stand on the line of his close, and prevent another's entry; but he cannot resist an approach towards it, by way of anticipating an injury. See *Reynell v. Champernoon*, Cro. Car. 228; *Weaver v. Bush*, 8 T. R. 81.

Further; Hall had a ticket, and a right to a passage, and a right to go through the depot to the platform, to claim a passage. He was not bound to give notice that he was a passenger; the defendants should have inquired of him what his purpose was, before laying hands on him.

Chapman, in reply. The Rev. Sts. ch. 2, 44, § 2, give no authority to corporations to make by-laws with penalties, which shall affect third persons.

SHAW, C. J. This is a criminal prosecution instituted against Power and several of his assistants acting under his orders, charging an assault and battery upon the complainant, Timothy Hall. It comes before the court upon a report of the evidence. It appears that the learned judge did not give detailed instructions to the jury, upon the questions of law arising in the case; but the evidence being stated, the jury were directed that the facts stated did not constitute a defence; and a verdict, under that instruction, was rendered against the defendants. If it was competent for the jury, consistently with the rules of law, to render a verdict for the defendants upon this evidence, then the verdict should be set aside and a new trial granted. It becomes then necessary to inquire what the rules of law are, and how they apply to the evidence reported.

The court are of opinion, that the railroad corporation, both as the owners and proprietors of the houses and buildings connected with the railroad, and as carriers of passengers, have authority to make reasonable and suitable regulations in regard to passengers intending to pass and repass on the road, in the passenger cars, and in regard to all other persons making use of such houses and buildings. This authority is incident to such ownership of the real estate, and to their employment as passenger carriers; and all such regulations will be deemed reasonable, which are suitable to enable them to per-

form the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers. The reasonableness of such regulations must in some measure be judged of with reference to the particular depot at which they are adopted. Regulations may be proper and necessary at one of the termini of the road, where there is usually a great throng of passengers and other persons connected with the business of the road, which would not be required at a way station, where few persons enter or leave the cars, and where they stop but a few moments.

And we are also of opinion, that the regulations, thus to be made and enforced, are not necessary to be made in the form of by-laws, to be carried into effect by penalties and prosecutions. Such by-laws are rather the regulations which a corporation have power to make in respect to the government of their own members, and of their corporate officers, or of municipal corporations, that exercise to a limited extent, the powers of government. But the regulations in question are such as an individual, who should happen to be the sole owner of the depots and buildings, and of the railroad cars, would have power to make, in virtue of his ownership of the estate, and of his employment as a carrier of passengers.

That a railroad corporation are to be deemed carriers of passengers, and are subject to the duties, and entitled to the privileges and powers incident to such employment, seems to be settled by various cases, in which suits have been sustained by and against them. They are in this respect on the footing of owners of steamboats. Both are modern modes of conveyance; but the rules of the common law are applicable to them, as they take the place of other modes of carrying passengers. *Jencks v. Coleman*, 2 Sumner, 221; *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. 611; *Pardee v. Drew*, 25 Wend. 459; *Pickford v. Grand Junction Railway Co.* 8 Mees. & Welsb. 372. An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order. *Markham v. Brown*, 8 N. Hamp. 523.

We are also of opinion, that the power which the company thus have to regulate their several depots, they may delegate to suitable officers. Indeed, it is the only mode in which a corporation can

exercise their powers. And where they have appointed a superintendent with authority, by himself and his assistants, to have charge of the depot and manage its concerns, it is incident to his authority to exclude, or direct the exclusion of persons who persist in violating the reasonable regulations prescribed, and thereby interrupt the officers and servants of the company in the discharge of their respective duties, or annoy passengers.

If it be insisted, that by opening the doors of their depots, the company give an implied license to any and all persons to enter, it may be answered, that by thus opening their doors, they do, *prima facie*, give an implied license to all persons to enter, and no person is a trespasser by merely entering therein. But all such licenses are in their nature revocable; and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, it is without a license, and the owner has a right to exclude them by force, if necessary, using no more force than is necessary for that purpose. *Weaver v. Bush*, 8 T. R. 78. Without such a power, the business could not be carried on; because the crowd of persons entering, without intending to take passage, might be so great as to exclude passengers.

In regard to the fact that Hall had a ticket at the time, and intended *bona fide* to go in the cars to Richmond, it appears to us that a fact within his own private knowledge, not communicated to the superintendent, when it was in his power to communicate it, cannot place the superintendent in the wrong, in a case where he would be otherwise justified. If Hall had repeatedly violated a reasonable regulation, in going upon the platform when expressly prohibited, and if the superintendent had reasonable ground to believe that he was repeating such violation, and he gave no notice that he then came there for another purpose, when it was in his power to do so, the superintendent and his assistants, acting on reasonable grounds of belief, must stand on the same ground of justification in this respect, as if Hall had no such purpose.

We are therefore of opinion, that upon the evidence detailed in the judge's report, the jury should be instructed in a manner somewhat as follows: That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management. That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots, for any purpose. That this power was properly to be executed by a superintendent, adapting his rules and regulations to the circumstances of

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the particular depot under his charge ; and that it was not necessary that such regulations should be prescribed by by-laws of the corporation. That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage, or landing from the cars, amounts in law to a license to all persons, *prima facie*, to enter the depot, and that such entry is not a trespass ; but that it is a license conditional, subject to reasonable and useful regulations ; and, on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect. That if the platform, as part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommodation of their baggage, and if the soliciting of passengers to take lodgings in particular public houses, by the keepers of them or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into or exit from cars ; that if, when urged with earnestness and importunity, it is an annoyance of passengers, and interruption to their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage ; or if the presence of such persons, for such a purpose, is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation, as passenger carriers ; then the prohibition of such persons from entering upon the platform is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot ; that such license as to him may be revoked ; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the superintendent and the persons employed by him ; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable. That as to the circumstances of the present case, if the superintendent had issued a circular, giving notice to all innkeepers and landlords, that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall, and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers ; and if, upon the particular occasion, he gave no notice of coming for any other purpose ; and if the defendant Power met him on his way to the platform, told him he must not go there, laid his hands on him, and ordered him to leave the depot, without any inquiry as to the purposes of Hall, and Hall made no reply, but pressed forward and attempted to reach the platform, in

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spite of the efforts of Power; this was strong *prima facie* evidence that he was going there with intent to solicit passengers, in violation of the notice and revocation of license; and that if he gave no notice of his intention to enter the car as a passenger, and of his right to do so; and if Power believed that his intention was to violate a subsisting reasonable regulation; then he and his assistants were justified in forcibly removing him from the depot. That if Hall gave no notice of his having a ticket, of his intention and purpose to enter the cars as a passenger, and of his right to do so, and that Power had no notice of it, then Hall could not justify his conduct, and make Power a wrongdoer, by proving the possession of such a ticket, or of his intent to go in the cars to Richmond, as a passenger; and that he was to be considered as standing on the same footing as if he had not possessed such ticket.

New trial granted.

The principles laid down in *Commonwealth v. Power*, were affirmed in *Hall v. Power*, 12 Metcalf, 482. It was there decided, that the superintendent of a railroad depot has not a right to order a person to leave the depot and not to come there any more, and to remove him by force if he did come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations of the company, or had conducted himself offensively towards the superintendent. A contrary rule would justify a superintendent in removing a person who had in all respects conformed to the rules and regulations of the company, and who had in fact demeaned himself with perfect propriety, if, in the judgment merely of the superintendent, he had violated any regulations of the company. This would be carrying the principle too far; quite beyond what the necessity of the case requires. With full power to make all necessary and suitable rules and regulations governing the conduct of those who may enter, or attempt to enter, upon the railroad, at the depot for passengers, and with full power effectually to apply such rules and regulations, and remove every person who actually violates them, the company will possess all the authority that the exigency of the case will require. Per

Dewey, J., in *Hall v. Power*, 12 Metcalf, 486. See also *The Eastern Counties Railway Co. v. Broom*, 6 Exchequer Rep. 314; 2 Eng. Law and Eq. Rep. 406; *Roe v. The Birkenhead and Lancashire Railway Co.* 7 Exchequer Rep. 36; 7 Eng. Law and Eq. Rep. 546.

In *Regina v. Mann*, 6 Cox, C. C. 461, (1854,) before Mr. Justice Wightman, the prisoner was charged in the first count of the indictment with assaulting John Smith, with intent to prevent his lawful apprehension; in the second count, with an assault with intent to do grievous bodily harm; and in the third count, with intent to disable. It appeared that the prisoner got into an empty third-class carriage, attached to a first and second-class train proceeding from Manchester to Stoke-upon-Trent. On reaching North-road station, he got out on the wrong side, and was accosted by the guard, who asked him for his ticket. The prisoner replied, "Ticket be d——d; I have no ticket;" and said he had intended to get out at the station for Crewe junction. No other demand was made on the prisoner; but the guard ordered him to get into a second-class carriage, and locked the doors. The train then proceeded to Stoke, a distance of several miles. The prisoner, on getting out, was asked for his ticket; and on his not producing it, the second-class fare

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from Manchester to Stoke was demanded. It not being paid, the policeman at the station collared the prisoner, who gave him a blow and got away. He was pursued and retaken, when the prisoner pulled out his knife and cut the policeman on the back of his hand. The reason alleged for bringing the prisoner on to Stoke was that it was the head-quarters of the railway authorities, and there was no mode of dealing with the prisoner at North-road station.

WIGHTMAN, J., to the jury. The prisoner gets into the train at Manchester; he gets out at North-road station, and his ticket is demanded, and not produced. On the contrary, the prisoner says he has not got it. The guard, instead of then taking him on the specific charge of going so far without his ticket, which perhaps he might have done, takes him in a second-class carriage to Stoke, several miles out of the way. A ticket from Manchester to Stoke is there demanded, and afterwards the full fare. It seems to me that this is clearly beyond the law, and that the railway authorities had no right to demand the fare from North-road to Stoke. I do not give any opinion as to the right to convey a person refusing to produce his ticket at one station on to another, on the charge of not paying his fare for that specific part of the journey which the prisoner had voluntarily and fraudulently performed; but whatever might have been the situation of the parties, if, on demand and refusal of the ticket or fare at North-road, the charge was there made, and he had been conveyed to Stoke for the purpose of dealing with it, here the arrest being for non-payment of the fare to Stoke, the apprehension was illegal, and the prisoner had a right to resist it. The only question is whether he did more than was reasonably necessary to effect his release from arrest. He does not appear to have had any other intent when he did the act charged, than to get away.

Verdict, guilty, on the ground that some excess of violence was used by the prisoner.

Loring v. Aborn, as reported in *The Monthly Law Reporter*, Vol. 1, (N. S.)

461, was an action of trespass for an assault and battery, tried in the Court of Common Pleas. The alleged assault was committed in putting the plaintiff out of a railroad car, of which the defendant had charge as a conductor, on the Boston and Maine Railroad, from Lawrence to North Andover. The plaintiff got into the cars at Lawrence with a ticket for North Andover. It is one of the regulations of the railroad, that passengers must, immediately after starting, surrender their tickets, or pay their fares if they have no tickets, or be turned out of the cars by the conductor. The plaintiff, when asked for his ticket by the defendant, showed it, but refused to give it up at that time, alleging that on a former occasion he had been put out of the cars after giving up his ticket, but promising to give it up when near the end of his route. There was no stopping place between Lawrence and North Andover. The conductor then stopped the train, and on the plaintiff's persisting in his refusal, expelled him from the cars. Mellen, J., ruled that the regulation of the road was reasonable, and that the plaintiff had no right to retain his ticket till he had got near the end of his route, even if he had not previously known of the rule, and that on his refusal to give it up, the conductor was justified in ejecting him with a reasonable degree of force; and that under the circumstances, (it being evident that the plaintiff meant to try his right,) it made no difference that the conductor did not demand payment of the fare before ejecting the plaintiff; that the only question for the jury was, whether unnecessary force was used; and that the jury on this point would not be very nice in scanning the acts of the conductor in the line of his duty, but would make allowance for any little irritation on his part produced by the conduct of the plaintiff; that the burden of proof on the question of the degree of force was on the plaintiff, and that, unless the jury were satisfied that too much force was used, the defendant was entitled to a verdict. Verdict for the defendant.

The instruction to the jury, in this case, that the burden of proof was on the plain-

Burglary — Indictment.

tiff to prove that the defendant used more force than was necessary to expel the plaintiff from the cars, was erroneous. Vol. 1, p. 355. *Loring v. Aborn*, 4 Cushing, 608. See note to *Commonwealth v. McKie*, ante, H.

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REX v. FURNIVAL.¹

Easter Term, 1821.

Burglary — Indictment.

On an indictment for burglariously breaking and entering a dwelling-house, and then and there stealing goods therein, but omitting to state the intent, the prisoner may well be convicted of the burglary, if the larceny be proved, but not otherwise.

But it is the better course first to charge the intent, and then to state the particular felony which has been committed.

THE prisoner was tried before Mr. Justice PARK, at the Lent assizes for the county of Stafford, in the year 1821.

The indictment charged the prisoner with burglariously breaking and entering the dwelling-house of one Thomas Rogers, (omitting the words "with intent to steal,") and twenty-four knives, &c., of the goods and chattels of the said Thomas Rogers, in the said dwelling-house, then and there found, feloniously and burglariously stole, took and carried away, &c. The indictment contained only this one count.

The facts were all clearly proved, both as to the burglary and the larceny, and the prisoner was convicted.

After the learned judge had passed sentence of death upon the prisoner, a doubt occurred to him, whether the omission of the words "with intent to steal" (although the indictment afterwards charged an actual stealing) would not vitiate this as an indictment for burglary. The learned judge thought it quite clear, that if the larceny had been negatived by the jury, (as, for instance, if the property had been laid in the wrong person,) although a complete burglary had been proved, no sentence could have been passed upon an indictment where the burglary was not fully stated. In Starkie's Cr. Law, vol. ii., p. 414, the precedent there given of an indictment for burglary contains the words "with intent to steal."

The learned judge, however, was ultimately of opinion, from what was stated in 1 Hale's P. C. 559, § 5, and the three following para-

¹ Russell & Ryan, C. C. 445.

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graphs, that the conviction in this case was right, although it was evident Lord Hale thought indictments for burglary ought to contain the words "with intent to steal."

The learned judge respite the execution of the sentence, for the purpose of taking the opinion of the judges upon this case, that there might be an uniformity of practice in preparing these indictments.

In Easter term, 1821, all the judges met and considered this case; they were of opinion that on an indictment like this, charging that the prisoner burglariously broke and entered a dwelling-house, and then and there stole goods therein, the prisoner might be well convicted of the burglary if the larceny was proved, *secus*, if not; but that it was better in all cases of burglary of this sort to charge the intent to steal, as well as the stealing, according to Lord Hale's advice, 1 Hale, P. C. 559. The judges held the conviction right.

JONES v. THE STATE.¹

December Term, 1840.

Burglary — Indictment.

Upon an indictment for burglariously breaking and entering a dwelling-house, and stealing goods therein, the prisoner may be convicted of the burglary, if the larceny be proved. And in such case it is not necessary to allege an intent to steal; as proof of the larceny is sufficient evidence of the intention.

WRIT of error, to reverse a judgment of the Court of Common Pleas.

At the January term, in the year 1839, of the Court of Common Pleas for this county, the plaintiff in error was indicted for burglary.

The indictment set forth that the said Jones, in the night time of the 14th day of January, 1839, broke and entered the house of one Coffin, at Alton, and stole therefrom a silver watch.

Upon this indictment the prisoner was tried in the Common Pleas, convicted, and sentenced to imprisonment for life.

- Afterwards, this writ of error was brought, and the following error, among others, was assigned, namely,

That the indictment does not allege any intent with which the said Jones broke and entered the said dwelling-house.

¹ 11 New Hampshire, 269.

Burglary — Indictment.

Gove, Attorney-General, for the State.

Hale, for the prisoner, cited the following authorities : 2 Hawk. P. C. 164 ; 1 Raym. 2 ; 2 Hale, P. C. 336 ; 6 East, 474 ; 2 Burr. 1037 ; 5 Rep. 122 ; 4 Ib. 42 ; 11 Ib. 37 ; 2 East, P. C. 474 ; 2 T. R. 687 ; 2 Hawk. P. C. 354 ; 1 Mass. 516 ; 4 C. & P. 571 ; 10 B. & C. 89 ; 1 Bacon's Abr. 336 ; 1 Hawk. ch. 39, § 17.

GILCHRIST, J. The prisoner is indicted for breaking and entering a dwelling-house, in the night-time, and stealing ; and the only question is, whether the indictment should have alleged an intent to steal.

The further allegation of an intent to steal would not have vitiated the indictment ; for we have held, in accordance with all the authorities, that the indictment may allege a breaking and entering with intent to steal and an actual stealing. *The State v. Squires*, 10 New Hamp. 37.

But it seems to be well settled by the authorities, that in an indictment for burglary, the allegation and proof of the stealing are sufficient, without an averment of an intent to steal.

In the case of *Rex v. Furnival*, Russell & Ryan, C. C. 445, the indictment charged the prisoner with burglariously breaking and entering a dwelling-house, and stealing. The burglary and the larceny were both proved, and the prisoner was found guilty.

Mr. Justice Park, before whom the prisoner was tried, took the opinion of the judges upon the question, whether the omission of the words, " with intent to steal," would vitiate the indictment ; and all the judges were of opinion that upon an indictment in this form the prisoner might well be convicted of the burglary, if the stealing were proved ; *secus*, if not ; but that it was better to charge the intent to steal, according to Hale's advice — 1 Hale, P. C. 559 ; so that, if the theft be unsupported, the prisoner may still be convicted on his evil intention.

There are many cases in the books, from an examination of which it would seem that this form has been followed without exception being taken for the reason now given.

Thus in the case of *Rex v. Comer*, 1 Leach, C. C. (4th ed.) 36, where the prisoner was indicted for breaking and entering and stealing, it was held by nine judges unanimously, that where the felony was laid to constitute the burglary, and not the intention to commit the felony, the acquittal of the felony included an acquittal of the burglary also.

So in the case of *Rex v. Butterworth*, Russell & Ryan, C. C. 520, it was held that upon an indictment for burglary and larceny against

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two, one may be found guilty of the burglary and the stealing, and the other of the stealing only.

And it is held that where an actual stealing is charged in burglary, it must be proved, and proof of an intent to steal is not sufficient. It is necessary to ascertain with exactness the felony actually intended, and it must be laid in the indictment, and proved, agreeably to the fact. Thus, where upon an indictment for burglary and larceny in stealing goods, it has appeared that there were no goods stolen, but that the burglary was with intent to steal, it has been holden that the indictment was not supported by the evidence. 2 East, P. C. 519; *Vandercomb and Abbott's case*, 2 Leach, C. C. (4th ed.) 708.

Where the indictment charges a burglary, with intent to commit a felony, it will be supported by evidence of a felony actually committed; and it seems sufficient in all cases, where a felony has actually been committed, to allege the commission of it, as that is sufficient evidence of the intention. 1 Hale, P. C. 560; 2 East, P. C. 514; Roscoe, Crim. Ev. 281.

We are, therefore, of opinion that the indictment is not defective.

Judgment affirmed.

An indictment for burglary, either at common law or under the statute, in order to be valid to support a conviction, must comprise certain essential points in addition to the ordinary requisites to an indictment, and these essential points we shall now proceed to consider. Hale has furnished us with the following precedent: Quod J. S., 1 die Julii, anno, etc., in nocte ejusdem diei vi et armis domum mansionalem A. B. felonice et burglariter fregit et intravit, ac ad tunc et ibidem unum scyphum argenteum, etc., de bonis et catallis ejusdem A. B., in eadem domo inventis felonice et burglariter furatus fuit, cepit et asportavit; or if no theft were actually committed, then ex intentione ad bona et catalla ejusdem A. B., in eadem domo existentia felonice et burglariter furandum capiendum et asportandum, (or), eâ intentione ad ipsum A. B., ibidem felonice interficiendum contra pacem, etc. 1 Hale, P. C. 549. And upon this precedent he has the following remarks, which he divides into five distinct clauses, each of them essential to the constitution of an indictment for burglary: —

(1) That it is said *noctanter*, in the night time, or *nocte ejusdem diei*, in the night of the same day, for if it be in the daytime it is not burglary. *Lewis v. The State*, 16 Connecticut, 32; *Commonwealth v. Mark*, 4 Leigh, 658; *Thomas v. The State*, 5 Howard, (Mississippi,) 20; *The State v. Wilson, Coxe*, 439, 440.

(2) That it be said *burglariter*, burglariously, for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or circumlocution, and, therefore, where the indictment is *bargalriter*, instead of *burglariter*, it makes no indictment for burglary, — so if it be *burgenter*.

(3) It must be *fregit et intravit*, "broke and entered," for it is held, that breaking without entering, or entering without breaking, makes not burglary; yet (Trin., 5 Jac., B. Regis,) an indictment quod felonice et burglariter *fregit domum mansionalem*, etc., was a good indictment for burglary, that the entry is sufficiently implied, even in an indictment by the words *burglariter fregit*, but the safest and common way is to say, *fregit et*

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intravit. Fielding's case, Dyer, 58, 99.

(4) It must be said *domum mansionalem*, the dwelling or mansion-house, where burglary is committed in a house, and not generally *domum*, for that is too uncertain, and at large.

(5) It must be alleged that the prisoner committed a felony in the same house, or that he broke, and entered the house to the intent to commit a felony. 1 Hale, P. C. 549, 550.

It is to be observed here, firstly, that Hale does not make any mention of the particular *day*, as being essential in indictments for burglary. And we find a passage in Lord Coke, which accords herein with Hale. "At the 12th sessions of the peace, holden at Norwich, for the county of Norfolk, anno 32 Eliz., one Syer was indicted of burglary, supposed to be committed 1 Augusti, anno 31 Eliz., whereunto Syer pleaded not guilty. And upon the evidence it appeared, that the burglary was committed 1 Septemb., anno 31 Eliz., so as at the time alleged in the indictment there was no burglary done; and, it was conceived, that the very true day in the indictment was necessary to be set down in the indictment, for that the judgment doth relate to the day in the indictment, and so avoids feoffments, leases, &c., for that as it was also conceived, the feoffee, lessee, &c., when the attainder is upon a verdict, should not falsify in the time of the felony; and thereupon the jury found Syer not guilty. And at the same sessions, Syer was again indicted for the same burglary, done 1 die Septembria, anno 31 Eliz., when in truth it was done. And he that gave the charge at that sessions doubted, whether upon this matter Syer might plead *auter fois acquit* for the same burglary, (for, seeing the offender is allowed no counsell, the Court ought to do him justice, and assigne him counsell *in favorem vite*, though he demand it not, to plead any matter in law appearing to the Court for his discharge); and thereupon he stayed the proceedings against him, and the assizes being at hand, he acquainted the justices of assize — Wray, C. J., and Peryam, J. — with this case, and with the doubts

conceived thereupon, who answered him, that the like case had then been lately propounded by Peryam, J., to all the justices of England; and by them three points were resolved; (1) That the Crown was not bound to set down the very day when the treason, felony, &c., was done, but the day set down in the indictment being before or after the offence done, the jury ought to finde him guilty, if the truth of the case be so; and if it be alledged before the offence done, to finde the day when it was done *in rei veritate*, for they are sworn *ad veritatem dicendam*, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment." *Syer's case*, Coke, 3 Inst. 230. From the opinion of the judges in this case it is clear, that in an indictment for burglary, it is not necessary to lay the particular day when the felony was committed, but on proof of its being committed in the night time of some day previous to the framing of the indictment, it would be sufficient. But an indictment requires that *some precise* day should be laid, though proof of the day on which the burglary has been committed need not, as we learn from the above passage of Lord Coke, correspond therewith. And we observe that the precedent above given from Lord Hale mentions a certain day. Kelyng cites this case of *Syers*, upon the same point being raised in favor of Sir Henry Vane upon his trial for high treason. "Although the treason of compassing the king's death," he says, "was laid in the indictment to be 30th of May, 11 Car. 2; yet upon the evidence it appeared, that Sir H. Vane, the very day the late king was murdered, did sit in council for the ordering of the forces of the nation against the king that now is, and so continued all along until a little before the king's coming in.

"It was resolved, that the day laid in the indictment was not material, and the jury are not bound to find him guilty that day, but may find the treason to be, as it was in truth, either before or after the time laid in the indictment, as it is resolved in *Syer's case*, Coke, P. C. 230.

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And, accordingly, in this case the jury found Sir H. Vane guilty of the treason in the indictment, the 20th January, 1 Car. 2, which was from the very day the late king was murdered, and so all his forfeitures relate to that time, to avoid all conveyances and settlements made by him." Kelyng, 16.

Again, upon the trial of Mr. Townley in 1746 for high treason, his counsel objected, that the overt acts, which were for levying war, were charged in the indictment to have been committed on the 10th October, and on that day only, whereas all the evidence was of overt acts committed on different days subsequent to that time; but the court overruled the objection. Foster, 8. And in a note subjoined to this case in Foster, whether by the learned judge himself or his nephew, Mr. Dodson, who published the second edition of his work, does not appear, we find "that Lord Balmerino, who had neither counsel nor witness at his trial, insisted on the same point; and the House, out of their extreme tenderness in case of life, (after the Lord Chancellor had delivered his opinion clearly, that the time is not material, provided the treason be committed before the bill found,) put the question to the judges; Lord C. J. Lee delivered their unanimous opinion, that the day is not material, provided the treason be proved to have been committed before the finding of the bill." Foster, 9. That the law is the same in cases of murder, we learn from another passage in Hale. "If A. be indicted, that the 1st July, 21 Car. 2, he robbed or murdered B., and upon evidence, it appears that it was committed another day or year, either *after* or *before* the time laid in the indictment, yet this proves the issue for the king." 2 Hale, P. C. 291.

The above extracts abundantly prove that it is not necessary in burglary to lay the precise day on which the offence may have been committed; and that the indictment may be good, even if, at the day laid, no burglary had actually taken place.

The precedent furnished by Lord Hale does not specify the particular hour of the night at which the burglary took place. But, elsewhere, he says: "Where the time of the day is material to ascertain the

nature of the offence, it must be expressed in the indictment — as, in an indictment for burglary it ought to say, *tali die circa horam decimam in nocte ejusdem diei felonice et burglariter fregit*, yet by some opinions *burglariter* carries a sufficient expression, that it was done in the night time." 2 Hale, P. C. 179; *Regina v. Thompson*, 2 Cox, C. C. 445. The term, "burglariously," says Hinman, J., in *Lewis v. The State*, 16 Connecticut, 32, 34, is understood in modern professional language, to imply that the act was done in the night. And it may be remarked *obiter*, that the words *ejusdem diei* presuppose the mention of a certain day, at all events, laid in the indictment. And that the precise hour should, at all events, be mentioned, we have the authority of East, founded on a case actually decided on this point. "The indictment must also not only state the fact to have been done in the night of such a day, but it ought also to express at about what hour of the night it happened; though it does not seem necessary that the evidence should strictly correspond with the latter allegation. In *Waddington's case* the indictment for burglary alleged the fact to have been committed in the night, but did not express at or about what hour it was done. Gould, J., held the indictment insufficient as for a burglary, and directed the prisoner to be found guilty of simple larceny only. He said, 'that as the rule then established was, that a burglary could not be committed during the twilight, it was therefore necessary to specify the hour, in order that the fact might appear, upon the face of the indictment, to have been done between the twilight of the evening and that of the morning.'" *Waddington's case*, 2 East, P. C. 513; *Lewis v. The State*, 16 Connecticut, 32. And see *The State v. G. S.*, 2 Tyler, 195, 200.

In Massachusetts, it has been recently held, in the case of *Commonwealth v. Williams*, 2 Cushing, 582, (1849,) that since the passing of stat. 4847, ch. 13, defining "the time of night time in criminal prosecutions," it is sufficient to allege, generally, that an offence was committed in the night time, without designating the particular hour of the night; and by such allegation

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is to be understood the period of night time as defined in that statute. In this case, Dewey, J., said: "The allegation in the indictment is, that the defendant broke and entered the city hall on the twelfth day of November, 1847, 'in the night time of said day.' It has been considered proper and necessary, until the statute of 1847, ch. 13, and such are the usual precedents, to state some particular hour of the night in which the burglary was alleged to have been committed. The reason for this seems to have been, that one might, with a felonious intent, have broken and entered a building, at a time properly called, in popular language, *night time*, and yet not have committed the crime of burglary; the time in which that offence can be committed being not so far extended as to embrace the night time, in the ordinary use of that word, but a period when the light of day had so far disappeared, that the face of a person was not discernible by the light of the sun or twilight. But the statute just cited has defined 'night time' for all purposes of criminal proceedings. Wherever 'night time' is now used in an indictment, as descriptive of the time of the commission of the offence, it is to be understood of the night time as defined by this statute. The allegation, that the breaking and entering were in that night time, is virtually an allegation that the offence was committed during the time between one hour after sunset on one day, and one hour before sunrise on the next day." In *Commonwealth v. Lamb*, 1 Gray, 493, it was held, that an indictment on the Rev. Sta. ch. 126, § 5, which impose a punishment on "every person who shall wilfully and maliciously burn, either in the night time or in the day time," any building therein mentioned, is not defective by reason of its alleging the offence to have been committed in the night time between the hour of sunset on one day and the hour of sunrise on the next day, notwithstanding st. 1847, ch. 13; although this error in the indictment would be fatal to sustaining the indictment, as charging the burning a building in the night time. But that is immaterial, as the punishment

authorized by the statute for burning the buildings therein described, either in the day or night time, is the same.

Lastly, the allegation of time must be repeated in the averment of every distinct material fact; but after the day and year have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words "and then" (*et adtunc*), and the effect of these words is equivalent to an actual repetition of the time. 1 Starkie, Cr. Pl. (2d ed.) 58; 1 Hale, R. C. 178. But the word copulative "and," without the addition of "then," would be insufficient. 2 Hawkins, P. C. ch. 23, § 88; Cro. Eliz. 739.

With regard to the second essential qualification in an indictment for burglary, as above laid down by Hale, in the first place every indictment for felony must always allege the fact to have been done *felonice*, feloniously. 2 Hale, P. C. 184. And, without the insertion of such word, an indictment for burglary would fail; nor is the word "feloniously" sufficient, unless the word "burglariously" be added. "For," as Hale says, "it is a legal word of art, without which burglary cannot be expressed with any kind of other word, or other circumlocution." 1 Hale, P. C. 550; 2 East, P. C. 512. In *Long's case*, Coke, speaking of the bad Latin which should not impeach judicial writs, says: "The same law of indictments, as if in an indictment it be *præfata Regina* where it should be *præfata Regina*, or *præfata Regi* for *præfata Regi*, or the like, forasmuch as the word is Latin and significant, and although it be not true Latin, the indictment for such incongruity shall not be quashed. But if the word be not Latin, nor allowed by the law as *vocabulum artis* (for every art and science has *propria vocabula artis*.) but is insensible, there if it be in a point material, it makes the indictment insufficient, as *burglaria*, *burglariër*, *murdrum*, *felonice*, and the like, are *vocabula artis*, known to the law, and therefore if such words, or the like, are mistaken in an indictment, so that there is in a material place a word insensible, which is not Latin, nor any word known

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in law, it makes the indictment vicious and insufficient, as *murdredum* for *murdrum*, or *burgariùter* for *burglariter*, *felonitèr* for *felonice*." *Long's case*, 5 Coke, Rep. 121. And how strict has been the attention paid to the word "burglariously," in indictments for burglary, will be seen from the following case.

"Richard Vaux brought appeal of burglary against Thomas Brooke, and declared that the defendant domum mansionalem prædicti Ricardi Vaux felonice et *burgaliùter* fregit, &c." The defendant pleaded not guilty, and by a jury of the county of Bucks, which appeared this Term at the bar, he was convicted of the felony and burglary aforesaid, and the defendant's counsel moved, in arrest of judgment, that the declaration was insufficient, because the word *burgaliùter* was of no signification, but the declaration ought to be *burglaritèr*, or *burgularitèr*, and the offence is called burglary, or burgulary, and not *burgalry*, for there wants an *l* between *g* and *a*, and in the latter syllable *l* is inserted in lieu of *r*, and *burglaritèr* est vox artis, as *felonice*, *murdravit*, *rapuit*, *excambium*, *warrantizare*, *frankalmoign*, *frank-marriage*, and several others, which cannot be expressed by any periphrasis or circumlocution; and this word *burglary* is derived from these two words, *burgh*¹ and *laron*, and therefore *burglary*, or *burgulary*, is sufficient, but not *burgalry*, for that wants sense; and many precedents warrant *burgulariter* to be good, but none was found to warrant *burgaliùter*; and upon this exception *Cur. adv. vult*, till the next Term; and in the mean time the plaintiff died; and that was shown to the court by the defendant's counsel as *amicus curiæ* (6 Mod. 143,) and made manifest by sufficient testimony, and thereupon the court was moved, that forasmuch as for this felony and burglary he was once convicted at the suit of the party, he could never be charged with the same offence at the suit of the king, that he might be thereof discharged, and upon that the court took advice; and it was resolved, that if the declaration had been

sufficient, then being convicted at the suit of the party, he should not be again impeached at the suit of the king; but it was resolved that the declaration here was insufficient, and, therefore, he was discharged." *Brooke's case*, 4 Co. Rep. 39; same case alluded to by Crompton, fol. 34.

In Massachusetts, it has been recently decided, that the statute definition of housebreaking has done away with the common-law requisitions of the offence, so that *burglaritèr* no longer makes a part of the *quo modo* of the crime. *Tully v. The Commonwealth*, 4 Metcalf, 357, (1842.) "We call this decision an important one," says George Bemis, Esq., in an interesting article in the Law Reporter, January, 1847, p. 387, "because in connection with a class of cases which have begun to form a line of precedents in the Massachusetts courts, *Josslyn v. The Commonwealth*, 6 Metcalf, 236; *Devoe v. The Commonwealth*, 3 Metcalf, 316; *Commonwealth v. Squire*, 1 Metcalf, 258, the old landmarks are fast vanishing in the jurisprudence of that respectable Commonwealth, before the supposed efficacy of statute phraseology, — phraseology, too, which has hardly changed a whit for the last half century, and under which common-law technicalities have hitherto been deemed indispensable." See also an article by the same gentleman in The Monthly Law Reporter, (N. S.) vol. vi. p. 199.

"But if the word *burglariously*, in the indictment, were merely misspelt, and were *idem sonans*, as if it were *berglariously* instead of *burglariously*, such error would not vitiate the indictment." *Williams v. Ogle*, 2 Strange, 889; *Shakespeare's case*, 10 East, 83; Archbold, Crim. Pl. (London ed. 1853,) 174.

Lord Hale complains of the strictness necessary to be observed in these technicalities of indictments. "In favor of life," he says, "great strictness has been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof. More offen-

¹ Lambard, in his "Justice," says it comes from "Bower," an inner chamber.

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ders escape by the over easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villany, and to the dishonor of God. And it were very fit that by some law this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy." 2 Hale, P. C. 193. But it must be remembered that in Hale's time prisoners had not the benefit of the assistance of counsel in cases of felony to the extent they have now, except in high treason, and, in addition to this, that the net spread by an indictment for burglary is a very wide one, for on failure of proof of the actual burglary, a prisoner may be convicted according to the circumstances of the case, of breaking the dwelling-house and stealing therein, of stealing in the dwelling-house to the value of 5*l*, or of a simple larceny, and that all upon one indictment.

(3) With regard to the third point mentioned by Hale, the words *fregit et intravit*, — *Anglicè*, "broke and entered," are both necessary to support an indictment for burglary, for, as we have already seen, the breaking without the entry, and the entry without the breaking, are insufficient.

In an indictment under the statute 7 & 8 Geo. 4, ch. 29, § 11, the words *break out* there used must be strictly followed. "The prisoner was indicted at the Central Criminal Court, February, 1835, for that he, about the hour of six in the night, of the 27th of January, at the parish of St. George, Bloomsbury, being in the dwelling-house of James Henry Henderson, did steal a cloak and other articles enumerated, and having committed the said felony, about the said hour, feloniously and burglariously did *break to get out* of the said dwelling-house. There was a second count, which charged that the prisoner being in, and having stolen, did *break and get out*. *Clarkson*, for the pris-

oner, objected that the indictment was bad, inasmuch as the words of the statute 7 & 8 Geo. 4, ch. 29, § 11, were not followed. Vaughan, J., and Patteson, J., were of the same opinion, and the jury were charged that they must confine themselves to the question of whether the prisoner was guilty of the simple larceny." *Reg v. Compton*, 7 Carrington & Payne, 139.

(4) With regard to the fourth point, the word *house* would be insufficient to support an indictment for burglary. Hawkins, P. C. 1, ch. 30, § 10. But Hawkins says, in a subsequent part of the same section, "Staundeforde and Anderson mentioned precedents of indictments of burglary in *domo*, without adding *mansionali*; however, the constant course of late precedents and opinions makes it certainly a very dangerous, if not an incurable fault, to omit the word *mansionalis* in an indictment of burglary in a house, and therefore, without question, it ought always to be inserted, where the truth of the case will bear it." The term *mansion-house*, *domus mansionalis*, used by Hale, has grown into disuse, and has become confined in its application to houses of a larger description than common, and the word *dwelling-house* is now generally used. But the word "*mansion-house*" sufficiently describes a dwelling-house. *Commonwealth v. Pennock*, 3 Sergeant & Rawle, 199.

The indictment must lay with precision whose dwelling-house it is in which the burglary has been committed, and if this be not laid correctly there can be no conviction either for burglary nor for a larceny committed in such dwelling-house, to the value of 5*l*. "At the Old Bailey February session, 1783, the prisoner was indicted for burglary in the dwelling-house of John Snoxall, and stealing goods therein, the property of Ann Lock. It appeared that it was not the dwelling-house of Snoxall, and it was therefore held by Buller, J., and Gould, J., that the prisoner could not be found guilty either of the burglary or of stealing to the amount of 40*s*. in the dwelling-house, under the 12 Anne, ch. 7, for it is essential in both

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cases to state in the indictment the *name* of the person, in whose house the offences are committed." *White's case*, 1 Leach, C. C. (4th ed.) 252; 2 East, P. C. 513. So in October, 1785, "William Woodward was indicted for stealing in the dwelling-house of Sarah Lunns. It appeared in evidence that her name was Sarah London. Sergeant Adair, Recorder, held the variance fatal to the capital part of the indictment." *Woodward's case*, 1 Leach, C. C. (4th ed.) 116, note. In Ohio, it is sufficient to lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of the dwelling. *Ducher v. The State*, 18 Ohio, 308.

In *Cole's case*, M., 37 & 38 Eliz. B. R., "an indictment quod shopam cujusdam Ricardi (without adding the surname) burglariter et felonice fregit et intravit, it was admitted for the matter by the Court of King's Bench to be good; but doubted whether it was good, on account of the omission of the surname." *Cole's case*, 1 Hale, P. C. 558. The reporter, however, says it was holden good. Moor, 466; 2 East, P. C. 513. In Moor it is said, that a blank ——— was left for the surname.

In 3 Chitty, Crim. Law, 1098, it is said, "that there can be little doubt that at the present day such an omission would be considered as material." 1 Russell, by Greaves, 826. "In all cases of this description, if there be any, the slightest doubt, whether the house broken and entered should be described as the dwelling-house of A., B., or C., the pleader should obviate the difficulty by inserting counts alleging it to be the dwelling-house of A., B., and C. respectively." Archbold, Crim. Pl. 323. The word "of" sufficiently alleges the ownership of the property. *Commonwealth v. Williams*, 2 Cushing, 582.

Burglary may be committed in a church, at common law. *Regina v. Baker*, 3 Cox, C. C. 581, (1849.) In this case, Alderson, B., said: "I take it to be settled law, that burglary may be committed in a church, at common law. I so held lately, on circuit. See *Regina v. Nicholas*, 1 Cox, C. C. 218. An indictment for burglary in a church need not lay the offence

as committed in a dwelling-house. "An indictment," says Hale, "quod felonice et burglariter fregit et intravit ecclesiam parochialem de D. ea intentione, is a good indictment for burglary, for *ecclesia* is *domus mansionalis*." 1 Hale, P. C. 556. But it is not necessary to say, that a church is a mansion-house, for burglary in a church is a distinct burglary of itself. And Coke says: "They be burglars which break any house or church in the night, although they take away nothing." Coke, 3 Inst. 65. In the case, therefore, of a burglary in a church, the indictment should lay that the prisoner feloniously and burglariously broke and entered the parish church of the parish to which it belongs, with intent, etc., according to the circumstances of the case. 2 East, P. C. 512; 1 Russell, by Greaves, 826; see also 1 Hawkins, P. C. ch. 38, § 10. In some of the United States, this offence is now provided for by statute, which makes it a distinct felony to break and enter any church or chapel, and steal any chattel therein. But in a very recent English case, Alderson, B., ruled that the acts of Parliament which particularly relate to offences respecting churches, do not destroy the offence at common law. *Regina v. Baker*, 3 Cox, C. C. 581, (1849.)

Where an outhouse having the same protection as the dwelling-house under the statute 7 & 8 Geo. 4, ch. 29, § 13, has been broken into, the offence may either be laid to have been committed in the dwelling-house, or in the building, parcel thereof. "In *Garland's case*, the jury found specially that the prisoner broke and entered in the night time, (with intent to steal,) an outhouse in the possession of George Shore, and occupied by him with his dwelling-house, mentioned in the indictment, and separated therefrom by an open passage eight feet wide; and that the said outhouse was not connected with the said dwelling-house by any fence including both. In Easter Term, 16 Geo. 3, the judges were of opinion that there should be judgment for the prisoner, for the jury should have found it *parcel* of the dwelling-house if it were so." *Rez v. Garland*, Somerset Lent Assizes, 1776, from

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Mr. J. Gould's MS., 2 East, P. C. 493. So also in *Dobbs's case*, the prisoner was indicted for burglary in the stable of James Bayley, *part of his dwelling-house*. *Dobbs's case*, 2 East, P. C. 513.

The parish in which the dwelling-house or church where the burglary has been committed, must be stated in the indictment, and proved as laid; a variance would be fatal. 2 Starkie, Crim. Pl. 437, note 2; Archbold, Crim. Pl. 323; Roscoe, Crim. Ev. 363. But it has been held, that if it be not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named in the indictment by way of special venue. *Commonwealth v. Lamb*, 1 Gray, 493; Roscoe, Crim. Ev. 363; 1 Russell, by Greaves, 827.

The prisoner was tried and convicted before Mr. J. Bayley, at the Lancaster Summer Assizes, 1824, of stealing in a dwelling-house, but a doubt having occurred whether the house was sufficiently described in the indictment, the learned judge submitted the point to the consideration of the judges. 'The indictment stated, that the prisoner, on the 6th of August, (5 Geo. 4.) at Liverpool, in the county aforesaid, one coat, value 40s., of the goods and chattels of Daniel Jackson in the dwelling-house of William Thomas, then and there being, then and there feloniously did steal,' etc. The doubt was, whether it should not have been stated, 'in the dwelling-house of William Thomas there situate.' Indictments for burglary and arson generally contain such a statement, and so do indictments for breaking a house in the daytime, or demolishing a house. In Michaelmas Term, 1824, the judges met and considered this case, and held that the indictment showed sufficiently that the house was situate at Liverpool, and that the conviction was therefore proper. *Rez v. Napper*, 1 Moody, C. C. 44.

So also in the case of *Regina v. Brookes*, tried for burglary at the Worcester Spring Assizes, 1842, before Mr. J. Patteson. The indictment stated, that John Brookes, late of the parish of Norton Juxta Kempsey, in the county of Worcester, laborer, and others, (naming them,) on the 4th day

of January, 1842, in the night of the same day, with force and arms, 'at Norton Juxta Kempsey' aforesaid, in the county aforesaid, the dwelling-house of Thomas Hooke there situate, feloniously and burglariously did break and enter, etc., (charging a burglary in the usual form, and the stealing of certain articles therein mentioned.).

Whitmore, for the prisoner, submitted that this indictment, as to the burglary, was bad, because the place, Norton Juxta Kempsey, at which the offence was alleged to have been committed, was not described by some word, importing some known division of the county, such as parish, vill, chapelry, or the like.

PATTESON, J. I think that the name of the place, Norton Juxta Kempsey, is sufficient of itself, without calling it either a parish, or a vill, or any thing of that kind. *Regina v. Brookes*, Carrington & Marshman, 544. See *Wood's case*, 1 Lewin, C. C. 36.

Where an indictment alleges a dwelling-house to be situate *at the parish aforesaid*, the parish last mentioned must be intended. 'The prisoner and two others were indicted at the Taunton Spring Assizes, 1832, before Mr. J. Park, for that they 'of the parish of Walcot,' in the county of Somerset, being riotously and tumultuously assembled at the parish of St. Peter and St. Paul, in the city of Bath, did then and there feloniously, and with force, begin to demolish, pull down and destroy a certain house of John Cooper and William Bishop, 'situate at the parish aforesaid.' It appeared that the house, which the prisoners had begun to demolish, was situate in the parish of St. Peter and St. Paul; but it was objected by *Rogers* for the prisoners, that the parish was not properly laid, because two parishes had been previously laid, and the indictment did not allege (as it ought to have done) that the house was in the parish last aforesaid. He cited as an authority 1 Rolle, Rep. 223. On the part of the Crown it was urged, that the objection, if of any weight, ought to have been the subject of demurrer, as it was only an ambiguity, and for this was cited *Walford v. Anthony*, 8 Bingham, 75. It

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was also contended, that the words '*parish aforesaid*' referred to the parish of St. Peter and St. Paul, *the last antecedent*; and *Rex v. St. Mary's, Leicester*, 1 Barnewell & Alderson, 327, was cited as decisive of the point. Park, J., after consulting with Mr. J. Gaselee, stated, that the indictment, in his opinion, was sufficient, but still he thought it better to reserve the point. His lordship, on a following day, said he had fully considered the point, and was of opinion, that the parish aforesaid must relate to the last-mentioned parish, and that the indictment was therefore good." *Rex v. Richards*, 1 Moody & Robinson, 177; Roscoe, Crim. Ev. 363.

The prisoners were indicted for a burglary at the Old Bailey Sessions, 1814, in the dwelling-house of William Alexander Frampton, in the parish of St. Catharine Cree. It appeared in evidence, that a warehouse, connected and occupied with the dwelling-house, was in St. Catharine Cree, but the dwelling-house itself was in the parish of St. Andrew Undershaft. The burglary was committed in the warehouse. One of the questions reserved for the opinion of the judges was, whether the indictment properly laid the burglary to have been committed in the parish of St. Catharine Cree, but the judges gave no opinion upon this point, having decided the case upon another ground. *Rex v. Bennett, Russell & Ryan*, C. C. 289; Roscoe, Crim. Ev. 363; Archbold, C. P. 323.

Where a dwelling-house is partly in one parish and partly in another, it has been held correct to lay the offence as committed in that parish, in which lies the part of the house so broken into.

In *Regina v. Howell*, 1 Cox, C. C. 190, the prisoners were indicted for burglary at the Central Criminal Court, March, 1845, before the late Recorder, upon the following indictment: "The jurors of our sovereign lady the Queen, upon their oath present, that T. Howell, late of the parish of St. Edmund the King and Martyr in London, and within the jurisdiction of the Central Criminal Court, laborer; F. Smith, late of the same place, laborer, and R. Franklin, late of the same place, laborer, on the tenth day of January, in the

eighth year of the reign of our sovereign lady Victoria, by the grace of God, etc., about the hour of ten in the night of the same day, with force and arms, at the parish aforesaid, and within the jurisdiction of the said court, the dwelling-house of George Warriner, *there situate*, feloniously and burglariously did break and enter with intent the goods and chattels, in the same dwelling-house then and there being, feloniously and burglariously, to steal, take and carry away; and *then and there*, with force and arms, two rings of the value of five shillings, of the goods and chattels of Felix Gatayes, in the same dwelling-house then and there being found, feloniously and burglariously did steal, take and carry away, against the peace of our lady the Queen, etc."

The house in which the burglary was committed was a tavern, of which George Warriner was the proprietor, and Felix Gatayes was a guest occupying a room in the said tavern. The outer door of the house always remained open during the day, and through this the prisoners had made their way to the room in question, which they entered by means of a skeleton key. The tavern was situated within two parishes, the boundary line, which separated them, running through the room of Gatayes. The door of the house, the door of the room, and a greater portion of the room itself were in the parish laid in the indictment; but a chest of drawers, from which the rings were abstracted, was in the parish of St. Michael, Cornhill.

Payne, on behalf of the prisoner Howell, submitted that there was a variance between the local description in the indictment and that proved. The prisoners were alleged to be of a certain parish, and this was referred to subsequently, in describing the dwelling-house as *there situate*, meaning the parish of St. Edmund the King and Martyr; but it was proved in evidence, that the dwelling-house was situate in two parishes, and, therefore, the allegation, which was a material one, was not sustained. It was true that the part of the house broken into was in the parish laid, but the statement was not that the breaking was in the parish, but that the dwelling-house was so. He then referred to

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Rex v. Bennett, Russell & Ryan, C. C. 289, ante, p. 36, where a somewhat similar point was raised, but not determined. At any rate he was entitled to ask of the prosecutor whether they would rely on the burglary, or relinquishing that, rest their case on the larceny of the goods.

B. C. Robinson for the prosecution. It is not less true that the dwelling-house of a party is in a particular parish, merely because some small portion of it is in another parish. Every part material to the present indictment is situated as laid, and this constitutes the distinction between the present case and that of *Rex v. Bennett*. There the part broken was not in the parish laid, but was assumed to be parcel of a dwelling-house situate in the alleged parish. A single dwelling, part of which is occupied by A., and another part by B., may be taken to be two, so that a burglary in B.'s portion may be alleged to be in his dwelling-house. This shows that a house is severable when occupied by two persons, and why may it not be so, when occupied by one? As to the goods stolen being located in another parish, it is immaterial, since there is no necessity to allege stealing at all; breaking, with intent to steal, is the gist of the charge, and as there were other goods in the same room, which were situated in the alleged parish, it will be a question for the jury whether the intent was not to steal them, as well as those which were actually stolen. The portion of the indictment, therefore, which sets out the stealing, may be rejected as surplusage, as far as the burglary is concerned. But still the jury may, if they think proper, convict of the simple larceny, for local description is for such purpose unnecessary, and a stealing being alleged, the words *there situate* are superfluous, and may be struck out.

The RECORDER. The common sense of the matter seems to me to be that the dwelling-house may be laid to be in the parish, where all the acts necessary to support the charge were committed, although some part of it is in another parish; but it is for you to consider whether it may not be safer to rely on the larceny alone, since, if I am wrong in my view of the point, the whole indictment will fail.

B. C. Robinson submitted that he was not bound to elect, and, considering that no property was found on the prisoners, though they were immediately apprehended, the jury might, perhaps, think that the larceny was not sufficiently proved. He deemed it right, therefore, that the whole case should go to the jury.

The RECORDER (in summing up) said: It appears to me that the indictment is sufficient. The objection relied on is, that the word *dwelling-house* has relation to the whole house, and that as the whole house is not in the parish laid, there is, therefore, a variance. But whatever might have been the mode of access, or whether we take the outer door, or the door of the room itself, they are all in the alleged parish. It might have been charged that the dwelling-house was in two parishes, but I doubt whether that could have been correct, inasmuch as the part broken could only have been situated in one. It is true that the local description must be strictly proved, but I think it is here fully established by the evidence. I would, however, assuming that you believe the facts, recommend you to limit your verdict to the breaking with intent to steal, since it is clear that the stealing, if any, was in another parish. Or you may, in your discretion, omitting all reference to the burglary, limit your verdict to the mere stealing.

The jury pronounced the following verdict: "Guilty of the offence of burglary, in the parish in the indictment mentioned; not guilty of stealing the goods."

The RECORDER respited the judgment until he should have an opportunity of consulting the judges on the point above raised. On a subsequent day, the Recorder said that he had consulted two of the learned judges on the above case, and they were of opinion that the evidence supported the indictment, and that the conviction was good. *Regina v. Howell*, 1 Cox, C. C. 190.

In *Regina v. Brookes*, Carrington & Marshman, 543, the prisoners were indicted at the Worcester Spring Assizes, 1842, before Mr. J. Patteson, for breaking into a warehouse. The indictment charged

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that John Brookes, late of the parish of St. Peter the Great, in the city of Worcester, laborer, John Attwood, late of, etc., (naming all the other prisoners,) the warehouse of Henry Webb, and another, *there situate*, did break and enter, and one hundred knives, etc., of the goods and chattels of the said H. Webb, etc., then and there being found, then and there feloniously did steal, take and carry away. It appeared in evidence that the parish of St. Peter the Great is partly situate in the county of Worcester, and partly situate in the county of the city of Worcester.

Whitmore, for the prisoners, submitted that the description of the parish, as laid in the indictment, was insufficient, and that the locality of the premises being material to this charge, it must be proved as laid. According to the allegation contained in this indictment, the *whole* of the parish of St. Peter was situate in the county of Worcester, but, according to the evidence, a *part* only of that parish was so situate.

PATTESON, J. I am of opinion that that is so, and the prisoners must be acquitted of the breaking into the warehouse, but they may be convicted of the larceny. Verdict, guilty of larceny. *Regina v. Brookes*, Carrington & Marshman, 543.

So also, in the case of *Rex v. Bullock*, 1 Moody, C. C. 324, note, which was an indictment for breaking into a house and stealing goods, the house was laid to be in the parish of Saint Botolph, Aldgate, and it was proved that the parish was Saint Botolph *without Aldgate*. The learned judge who tried the case, (Littledale, J.,) directed an acquittal of the capital part of the charge, but allowed a verdict of guilty of the larceny. He afterwards, however, doubted the propriety of the conviction, and reserved the point for the opinion of the judges. The learned judges held, that as there was no negative evidence of there not being such a parish as *Saint Botolph, Aldgate*, the conviction was right.

Where an indictment alleged that a burglary was committed "at the parish of Woolwich," and the prosecutor proved that the correct name of the parish was

"Saint Mary, Woolwich," but the parish is called the parish of Woolwich in the Central Criminal Court Act (4 & 5 Wm. 4, ch. 36, § 2,) it was held by Parke, B., and Bosanquet, J., who tried the case (November Session, 1839,) that as that act showed that the parish was known by the name of the parish of Woolwich, the indictment was sufficient. *Regina v. St. John*, 9 Carrington & Payne, 40; 1 Russell, by Greaves, 827.

In all cases where any difficulty is likely to arise respecting the local description of the dwelling-house, different counts should be inserted in the indictment, varying it according to the circumstances.

The allegation of *place*, as of *time*, must be repeated in the averment of every distinct material fact; but after the *place* has been once stated with certainty, it is sufficient afterwards, in subsequent allegations, to refer to it by the words "there," or "there situate," (*ibidem* in ancient indictments,) and the effect of these words is equivalent to an actual repetition of the *place*. 1 Starkie, Crim. Pl. (2d ed.) 58; 1 Hale, P. C. 178; 2 Hawkins, P. C. 25, 78. It is however usual, in modern practice, to repeat the words, "in the said dwelling-house," or, "in the said dwelling-house then being," and, "at the parish aforesaid, in the county aforesaid."

An indictment for housebreaking, at the Worcester Summer Assizes, 1841, after charging the prisoner with breaking and entering the house in the usual form, charged that he, forty-two pieces of the current gold coin of this realm, called sovereigns, etc., in the same dwelling-house then and there being found, *then and there* feloniously did steal, take and carry away, etc. Greaves, for the prisoner, objected that the words "then and there," were insufficient, and there ought to have been added to them, "in the same dwelling-house," but Coleridge, J., after referring to a case of *Regina v. Smith*, 2 Moody & Robinson, 115, where Patteson, J., had held a similar objection valid, said: "I had occasion to mention that case to my brother Patteson, and he seemed to think the decision was incorrect. I think the present indictment is sufficient." *Regina*

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v. Andrews, Carrington & Marshman, 121.

Where an indictment for burglary, at the Welsh Spring Circuit, 1841, charged that the prisoner feloniously and burglariously, by night, the dwelling-house of one John Davies did break and enter, with intent one Alice Davies, in the said dwelling-house then being, violently, and against her will, then and there feloniously to ravish and carnally to know, etc., (charging burglary with violence under the statute.) *E. V. Williams*, for the prisoner, objected that the indictment was insufficient, and that as burglary was defined to be a breaking and entering of the dwelling-house, with intent to commit a felony therein; the indictment ought to have alleged the intent to be to ravish Alice Davies in the said dwelling-house, and not merely then and there. Colman, J., who tried the case, said he should certainly not stop the case on this objection, but would reserve the point, if necessary, for the consideration of the judges. The case was reserved, but the above point was not considered by the learned judges, but they were all of opinion that the breaking and entering a dwelling-house, with intent to commit a rape (being the point submitted to their consideration,) was not a crime which included an assault. *Regina v. Watkins*, Carrington & Marshman, 264; 2 Moody, C. C. 217.

In England, since the 7 Geo. 4, ch. 64, if a burglary be committed within 500 yards of the boundary of a county, the offenders may be tried in the adjoining county. 1 Russell, 827. The 12th section of that statute (which repealed the 2 & 3 Edw. 6, ch. 24, § 2, whereby it was required that trial for murder should be in the county where the death happened,) purporting to be for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, enacts, "that where any felony or misdemeanor shall be committed on the boundary, or boundaries, of two or more counties, or within the distance of 500 yards of any such boundary or boundaries, or shall be begun in one county and completed in

another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein." An indictment for burglary, which had been found by the grand jury for the county of Hereford, at the Spring Assizes, 1829, alleged the burglary to have been committed "at the parish of English Brickner, in the county of Gloucester, within 500 yards of the boundary of the county of Hereford." Upon the arraignment of the prisoners at Hereford, it was objected that the indictment was bad, on the ground that the 7 Geo. 4, ch. 64, § 12, only applied to larceny and other transitory felonies, and not to felonies which were local in their nature; but the learned judge who tried the case (Parke, B.) held that the indictment was good, the effect of the 7 Geo. 4, ch. 64, § 12, was to give adjoining counties concurrent jurisdiction over 1000 yards; that the words "dealt with," applied to justices of the peace, who had consequently jurisdiction over 500 yards in the adjoining county to that in which they were qualified to act; that the words "inquired of" applied to the grand jury; "tried" to the petit jury, and "determined and punished" to the courts of sessions and assizes. *Rez v. Ruck*, 1 Russell, by Greaves, 827, from MS. by C. S. G.; Roscoe, Crim. Ev. 252.

(5.) We have now arrived at the fifth qualification, given us by Hale as essential to support an indictment for burglary. "It must be alleged that the prisoner committed a felony in the same house, or that he broke and entered the house to the intent to commit a felony." 1 Hale, P. C. 550. Here there are two allegations, either of which is sufficient to support an indictment for burglary, for we may either say that the prisoner burglariously broke and entered with the intent to commit felony, or if the evidence can support the charge of felony actually committed, we may lay that the prisoner actually committed the felony without laying the intent, for the intent may be inferred from the facts of the case.

"The commission of felony," Lord Hale

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observes, "is sufficient evidence of the intention." *Rex v. Locost and Villers*, 1 Hale, P. C. 560; Kelyng, 30; *Commonwealth v. Hope*, 22 Pickering, 1, 5.

With regard to the first allegation above mentioned by Hale, where the indictment lays the actual commission of felony, without laying the intent, the actual commission of felony must be proved. One was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but a burglary, with intent to steal, and not being so laid as it ought to have been, Lord C. J. Holt directed the prisoner to be acquitted. O. B. Oct. 1700; 2 East, P. C. 514. See also the judgment of Buller, J., in *Vandercomb and Abbott's case*, 2 East, P. C. 519, 520, 521. So also if an indictment for burglary charge an actual rape, evidence of an assault, with intent to ravish, will not support it.

Where an indictment for burglary charges an actual stealing of goods, the owner of such goods must be correctly named, *Jones and Bever's case*, Kelyng, 52, although this case has been overruled upon another point. "Where the indictment was for breaking and entering, etc., the house of J. Davis, with intent to steal the goods of J. Wakelin, and there was no such person who had goods in the house; but J. Wakelin was put by mistake for J. Davis, the prisoner was entitled to an acquittal, and it was ruled that the words 'J. Wakelin' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods, and without such words the description of the offence would be incomplete." *Jenks's case*, 2 East, P. C. 514; 2 Leach, (4th ed.) 774; 3 Greenleaf on Ev. (3d ed.) § 17.

But it appears that if the name of the goods has once been correctly stated in the indictment, an error in a subsequent part will not vitiate it. In *Regina v. Rudge*, Gloucester Spring Assizes, 1841, Coleridge, J., seemed clearly of opinion that an indictment for murder, which alleged an assault on Martha Sheddou, and that the prisoner, the said Margaret Sheddou, did strike, etc., was not therefore bad. 1 Russell, 825, note by Greaves.

And in *Rex v. Exminster*, 6 Adolphus & Ellis, 598, where an assignment of Elizabeth Mathews, as an apprentice to the Rev. Thomas Melhuish, mentioned her subsequently as *Elizabeth Melhuish*, this error in the surname was held by Lord Denman and Littledale, J., the rest of the court concurring, not to vitiate the assignment.

A bailee may have such property in goods, as to be considered the owner of them, if an indictment for burglary with intent to steal the goods, or an indictment alleging the actual stealing of them, lay the ownership in him. *The State v. Ayer*, 3 Foster, (N. H.) 301. The prisoner was indicted at the Central Criminal Court, November, 1830, before Mr. J. Bosanquet for breaking and entering the dwelling-house of Louis Ryezor, and stealing a watch, the property of David Miers. It was proved by Mr. Miers that the house was taken by his brother-in-law Mr. Ryezor, and that the witness, who lived on his own property, carried on his business of a silversmith there, for the benefit of Mr. Ryezor and his family, but had himself no share in the profits, and no salary. He stated that he had power to dispose of any part of the stock, which was worth near 3,000*l.*, and that he might, if he pleased, take money from the till as he wanted it, but he should inform his brother-in-law that he had done so. He also stated, that he sometimes bought goods for the shop, but that sometimes his brother-in-law did so; with respect to the breaking, he stated that a pane of glass in the shop window had been cut for as much as a month before, but that there was no opening whatsoever, as every portion of the glass remained exactly in its place, and that at the time of the theft, he both saw and heard the prisoner put his hand through the glass and take the watch. *Horry*, for the prisoner, submitted, first, that as Mr. Miers exercised so much dominion over the stock in the shop, he ought to have been described as a partner with Ryezor; and, secondly, that as the glass of the window had been cut before, there was no breaking. Bosanquet, J., said: Upon this evidence Mr. Miers was a bailee of the

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stock, and, therefore, in a case of this kind, the property may be well laid in him; and with respect to the breaking, that is quite sufficient to support the present indictment. Verdict, guilty." *Regina v. Bird*, 9 Carrington & Payne, 44.

An indictment under the statute 7 & 8 Geo. 4, ch. 29, § 11, for breaking out of a dwelling-house, having committed felony therein, must, if the felony be in having stolen goods, allege the ownership of them exactly, as in an indictment for burglary at common law, and such allegation must be proved as laid. So, also, an indictment under the 1 Vict. ch. 86, § 2, for burglary with violence, must state the person against whom violence has been proved, and the proof must correspond with such allegation. "The prisoners were indicted before Alderson, B., at the Monmouth Spring Assizes, 1838, for burglary with violence, under the 7 Wm. 4 & 1 Vict. ch. 86, § 2. The indictments charged them with having committed a burglary in the dwelling-house of Sarah Williams, and struck David James. The burglary was proved; but it appeared that the name of the person struck was *Jones*, and not *James*. Alderson, B., having conferred with Gurney, B., said: We neither of us entertain any doubt on this point. The indictment must allege both the burglary and the striking, and the proof must correspond with the indictment. Verdict, guilty of simple burglary." *Regina v. Parfitt*, 8 Carrington & Payne, 288.

In an indictment for burglary containing a charge of stabbing, cutting, or wounding, under the statute 7 Wm. 4 & 1 Vict. ch. 86, § 2, it is not necessary to state the instrument or means by which the injury has been inflicted; and such statement, if made, does not bind the prosecutor to prove the violence done by such means. *Rez v. Briggs*, 1 Moody, C. C. 318; Archbold, Crim. Pl. 329. In this case, the first count of the indictment charged the prisoners, that they, on the 9th of January, &c., at the parish of Hatfield, &c., feloniously, &c., with a certain stick, and with their feet, did strike, kick, and wound William Lyall upon his head,

with intent to maim him, against the statute, &c. The second count stated the intent to be to disfigure, the third to disable, the fourth to do some grievous bodily harm. The jury found the prisoners guilty of wounding the prosecutor with intent to do some grievous bodily harm; but they stated that they could not tell whether the wound was caused by a blow from a stick or a kick with a shoe. Upon an objection being taken by the counsel for the prisoners, that although a wound given by a stick might be within the statute 9 Geo. 4, ch. 81, § 12, a wound given by a foot with a shoe on it was not; and that, if it was, the mode of wounding was not properly described in the indictment, which stated it to have been done with the feet only, Mr. J. Littledale thought it right to reserve the point for the consideration of the judges. Afterwards, in Trinity Term, 1831, the case having been argued before all the judges (except Patteson, J.) by *Cottingham*, for the prisoners, their lordships unanimously held, that the means by which the wound was inflicted need not have been stated; that it was mere surplusage to state them, and that the statement did not confine the crown to the means stated, but might be rejected as surplusage; and that, whether the wound was from a blow with a stick or a kick from a shoe, the indictment was equally supported, and they, therefore, held the conviction right. 1 Moody, C. C. 322.

Secondly. "An indictment for burglary may allege an intent to commit felony, without alleging an actual felony committed. But in this case care must be taken that the actual felony done correspond with the felony laid, as intended to be done, otherwise the indictment will be bad." 1 Hale, P. C. 561; 2 East, P. C. 514. But if, in committing the felony laid in the indictment as intended to be committed, a person commit another felony, which results from or is necessarily connected with the felony intended, this will not vitiate the indictment. For, as East observes, (2 East, P. C. 514,) "it is a general rule, that a man who commits one sort of felony, in attempting to com-

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mit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence. Yet this, it seems," he adds, "must be confined to cases where the offence intended is itself a felony;" according to the resolution in *Dobbs's case*, 2 East, P. C. 513, who was indicted for burglary in breaking and entering a stable, with intent to kill and destroy a horse. "His object being not to kill, but to prevent the horse from running, Lord C. B. Parker held, that as his intention was not felonious, but a trespass, the death of the horse, resulting from his act, did not make his offence a burglary." The same fact, as we have already seen, may be laid with different intents. "In *Thompson's case*, the first count laid the fact to be with intent to steal the goods of J. D.; the second count laid it with intent to kill and murder him. Upon objection made, that there were two distinct capital charges in the same indictment, seven judges, (being all who were present,) held the indictment good. They said, it was the same fact and evidence, only laid in different ways." *Rex v. Thompson*, 2 East, P. C. 515. It has been held by two learned judges, that where an indictment charges a burglarious breaking and entering a dwelling-house, with intent to steal, it need not be particularly stated whose goods they are which the indictment charges the intent to steal. "The prisoner was indicted before Mr. J. Coleridge, at the Hereford Spring Assizes, 1844, for burglary. The first count of the indictment charged that the prisoner, &c., the dwelling-house of one Elizabeth Bird feloniously and burglariously did break and enter, with intent the goods and chattels in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, and then and there feloniously did steal five taps and a quantity of wine, beer, cyder, and candles of the said Elizabeth Bird. The second count was exactly similar, but charged a breaking of the dwelling-house of Elizabeth Bird and others, and laid the property stolen to be in Elizabeth Bird and others. It appeared upon the evidence

that the house in question was broken into on the night of the 13th of January, 1844, and the goods mentioned in the indictment stolen; and it appeared that Miss Elizabeth Bird was the sole tenant of the house, but that she and two other ladies lived in it in common, each of the three contributing an equal amount to the establishment, and that the articles which had been stolen had been purchased by Miss Bird, but that, at the end of the year, they would be paid for by the three ladies, when they divided the expenses of the establishment. It was objected by *W. H. Cooke*, counsel for the prisoners, that neither of the counts of the indictment was proved, as the evidence showed that the house of Miss Bird was broken, and the goods of the three ladies were stolen.

"Coleridge, J., (after having conferred with Parke, B.): We think that, to support the first count of this indictment, it is sufficient to prove that the prisoner broke and entered the house of Miss Bird in the night time, with intent to steal the goods there generally; and that, by the evidence given in this case, the first count of this indictment is good." *Regina v. Clarke*, 1 Carrington & Kirwan, 421. The case of *Regina v. Lawes*, for a misdemeanor, had been decided on a similar point. The indictment charged that the prisoners, "on the 22d day of August, 1842, with force and arms, at the parish of Moulsoford, &c., the dwelling-house of Richard Parsons, there situate, unlawfully did break and enter, and then and there unlawfully were in the said dwelling-house of the said Richard Parsons, with intent the goods and chattels, in the said dwelling-house, then and there being, feloniously to steal, take, and carry away, against the peace, &c. The prisoners being convicted, it was objected by *Price*, in arrest of judgment, that the indictment was bad, as it did not state *whose goods* the prisoner intended to steal. *Erskine, J.*, (after having conferred with Wightman, J.,) said: 'My brother Wightman concurs with me in thinking that the indictment is sufficient.'" *Regina v. Lawes*, 1 Carrington & Kirwan, 82.

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When the indictment charges an intent to steal, it is not necessary to prove an actual stealing. "If a man," says Hale, "breaks and enters a house, with the intent to commit a felony, though he attains not that intent, but takes or steals nothing, this is burglary." 1 Hale, P. C. 562; Dyer, 99; Staundeforde, P. C. 30. And Coke, in his definition of burglary, expressly says, "whether his felonious purpose be executed or not." Coke, 3 Inst. 63.

The decision in *Furnival's case*, and the recommendation there given, to include in an indictment for burglary both an intent to commit felony and the actual commission of the felony, has been considered to settle the practice in preparing such indictments. See *Commonwealth v. Hope*, 22 Pickering, 1; *Commonwealth v. Tuck*, 20 Pickering, 356; *Josslyn v. The Commonwealth*, 6 Metcalf, 236; *Devoe v. The Commonwealth*, 3 Metcalf, 316; *Larned v. The Commonwealth*, 12 Metcalf, 240; *Crowley v. The Commonwealth*, 11 Metcalf, 575; *Kite v. The Commonwealth*, 11 Metcalf, 581; *The State v. Ayer*, 3 Foster, (N. H.) 301; *The State v. Moore*, 12 New Hampshire, 42; *The State v. Squires*, 11 New Hampshire, 37; *Commonwealth v. Brown*, 3 Rawle, 207. The passages in Lord Hale, which the judges referred to, and which influenced their judgment, are extremely interesting, and are fully entitled to be transcribed entire. He says: "If the indictment be *quod domum mansionalem J. S. felonice et burglariter fregit et intravit, et adtunc et ibidem, certain goods of J. S. felonice et burglariter furatus fuit cepit et asportavit*, the indictment compriseth two offences, burglary and felony, and therefore he may be acquitted of the burglary, if the case be so upon the evidence, and found guilty only of the felony, and then he shall have his clergy; or he may be acquitted of the felony, but then, *quære*, whether he can be found guilty of the burglary, because, though where the indictment compriseth burglary and felony, the indictment is good, though it be not supposed in the indictment that it was *ea intentione ad bona furandum*, for the act of theft being charged at the same time,

it is a sufficient evidence of his intention: but when he is acquitted of the felony, then there being nothing expressly charged in the indictment that *burglariter fregit, etc., ea intentione ad bona, etc., felonice furandum*, it stands single, as if the indictment had been of single burglary, in which case, the clause of *ea intentione ad furandum, etc.*, had been necessary to complete a single burglary. It seems, therefore, necessary in such cases, not only to charge him that in *nocte et burglariter et felonice domum, etc., fregit et intravit et bona, etc., cepit*, but also further to say, *ea intentione ad bona et catalla, etc.*, in *eadem domo existentia felonice et burglariter furandum*, and to add, also, the particular felony, *et adtunc et ibidem unum scyphum argenteum, etc.*; and then and there one silver cup, and then, though he be acquitted of the felony, the rest of the indictment stands good against him as a single burglary, and he may be convicted of it, though acquitted of the felony. And, I think, that as the offences of burglary and felony may be found in the same indictment, so three offences may be found in the same indictment, and if he be acquitted for one, he may be convicted of the other two; and it may be of use to exclude a malefactor from his clergy. Where the offence is great, as, namely, for burglary and for felony, upon the statute 5 & 6 Edw. 6, ch. 9, for there may be an offence against that statute which will exclude from clergy, and yet not amount to burglary; the form of the indictment may run thus (Anglice): That A., on the first day of February, in the year of our Lord, &c., in the night of the same day, (he omits to mention the precise hour,) with force and arms, the dwelling-house of B., &c., feloniously and burglariously did break and enter, with intent the goods and chattels of the said B., in the said dwelling-house, then being, feloniously and burglariously to steal, take, and carry away, and then and there, with force and arms, one silver cup belonging to the said B., in the said dwelling-house, then being, feloniously and burglariously did steal, take, and carry away, the said B. himself, and his wife and children and

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servants in the said house then being, contrary to the peace, &c.

“And *note*, that such an indictment need not conclude *contrà formam statuti*; it is sufficient that it brings the case so within the statute as to exclude clergy, and so upon the statute 23 Hen. 8, ch. 1. By that statute, ‘All persons found guilty of robbing any church or chapel, or other holy place, or of robbing any person in his dwelling-house, the owner of the same house, his wife, children, or servants, then being within, and put in fear and dread by the same, or for robbing any person in or near the highway, and those that are found guilty of abetting, procuring, helping, or counselling thereof, are exempt from the benefit of clergy, except such as are in the order of subdeacon.’ 1 Hale, P. C. 517.

“And upon this indictment, if it falls out upon the evidence that he is guilty of the burglary, but not guilty of the stealing, he may be convicted of the burglary, and so ousted of his clergy, though he be found not guilty of the felony. Again, though he be found not guilty of the burglary, because it may be the breach of the house was in the daytime, the dweller, his wife, or servants, being in the house, yet he may be found guilty of the felony within the qualifications contained in the indictment, pursuant to the statute of 5 & 6 Edw. 6, and so ousted of his clergy; for that is not confined either to the day or night. Again, if upon the evidence it appears not to be burglary, because done in the daytime, nor yet felony so qualified as to exclude from clergy, because either there was no act of breaking, or, if there were, yet the dweller, his wife, or servants, were not in the house, he may be convicted of common larceny, and so have benefit of clergy; and so much of burglary joined with larceny.” 1 Hale, P. C. 559, 560, 561.

Upon this passage of Hale we may observe, first, that if the indictment charge only what he terms a single or simple burglary, (for he uses both expressions,) that is, a burglarious breaking and entering in the night time, with intent to commit a felony, and any one of the requisite

proofs to establish the burglary fails, as if the breach or entry, or the time or the place, or the ownership of the dwelling-house be not made out by the evidence, but an actual felony be clearly proved, still the prisoner cannot be convicted of that felony, for it was not charged in the indictment. Any one of the ingredients of the burglary having failed, the whole indictment falls to the ground, for it only charged a single act of the prisoner, namely, a burglarious breaking and entering into the dwelling-house of A. B., with intent to commit felony, without going on to charge the actual felony committed. This would be the case, not only in a larceny, but in murder, rape, or any other felony. And the converse of the proposition is equally true; for if an indictment for burglary charge an actual commission of felony, without laying the intent, and there is no proof of the actual commission of the felony, the prisoner must be acquitted of the burglary as well as of the felony, for the indictment contains but one charge, namely, a burglarious breaking and entry into the dwelling-house, and a commission of felony therein, and one part or ingredient of the offence charged failing, the whole indictment falls to the ground. And the reasoning of Buller, J., in *Vandercomb and Abbott's case*, 2 East, P. C. 520, is to the same effect. “The crime of burglary,” he says, “is of two sorts: first, breaking and entering a dwelling-house in the night time, and stealing goods there; secondly, breaking and entering a dwelling-house in the night time with intent to commit a felony, though that felony be not committed. The circumstance of breaking and entering the dwelling-house is essential to both, but it does not of itself constitute the crime in either; for there must be a felony committed or intended, without one of which the crime of burglary does not exist, and these offences are so distinct in their nature, that evidence of one will not support an indictment for the other. For example, if a man be indicted for breaking and entering a house in the night time, and stealing goods there, evidence that he broke and intended to steal

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goods, etc., or to commit any other felony, would not support the indictment." Upon this passage, East subjoins a *quære*, as follows: "Q. Whether the definition of the crime be not solely resolvable into the breaking, etc., with intent to commit felony, of which the actual commission is such a strong presumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment; and, therefore, an indictment charging the breaking, etc., with intent to steal, is said to be supported by proof of actual stealing, though certainly not *vice versa*." 2 East, P. C. 520.

And Mr. Greaves, in a note upon Mr. J. Buller's twofold division of the offence of burglary, remarks, "that the report of his judgment has stated the point too largely, as it seems to go to the extent of saying, that evidence of a breaking and entering, and a felony actually committed, will not support an indictment for breaking and entering, and a felony intended to be committed." 1 Russell, by Greaves, 830, note.

We may observe that the learned judge, having laid down his proposition, namely, "that there must be a felony committed or intended, and that these offences are so distinct in their nature, that evidence of one will not support an indictment for the other," goes on to prove the first of these propositions, and apply it to the case then under consideration, but leaves the second proposition untouched. It is beyond all doubt that evidence of a felony intended will not support an indictment charging a felony committed for the reasons we have above given, but take the converse proposition, and how can the intention to commit felony be better inferred than from a felony actually committed?—as in the case of *Locost v. Villiers*, Kelyng, 30. Not that a felony committed in a dwelling-house, after breach and entry, is an absolutely positive proof, amounting to certainty, and excluding all other suppositions of such breach and entry being made to commit that felony. A man might open the door of a tavern in London at night, and enter for the purpose of getting liquor, and seeing silver lying in

the bar might steal it; here the commission of the larceny would be no actual proof that the entry was with intent to steal, although every other of the ingredients of burglary were fully satisfied. But as the human mind, in general, can only be interpreted by actions, the case above put could be only an exception to the rule, and an indictment charging a felony intended can in an ordinary way be only satisfactorily made out by presumptive proof, namely, by evidence of felony actually committed, and the jury must infer the cause from the consequence, instead of the consequence from the cause. On the other hand, if the indictment charge a burglarious breach and entry with intent to commit felony, and also charge the actual felony committed, then if proof fails of the burglary, as if there be no breach or no entry, or if it be not by night, or the house laid as the dwelling-house be not considered by law as such, or if the ownership of such dwelling-house be not correctly laid, still the jury may convict of the felony; or if proof fail of the felony, as, *e. g.*, in cases of stealing, if there be no asportation, or of rape, if an assault only be proved, still the jury may convict of what Hale calls the single burglary. The statute of 5 Edw. 6, ch. 9, above referred to by Hale, was as follows: "If any person be found guilty, according to the laws of the land, of robbing any person or persons in his or their dwelling-houses, or dwelling-places, the owner or dweller, his wife, children, or servants, being within the same house or place, or in any place within the precincts thereof, such offender shall not be admitted to clergy, whether the owner or dweller, his wife or children, then or there being, shall be waking or sleeping. And also he that robs any person in any booth or tent in any fair or market, his wife, children, or servants, then being within the booth or tent, shall be excluded from clergy." 1 Hale, P. C. 520. The word *robbing* here seems to mean *stealing* from, for the statute says, the punishment shall be the same, even if the inmates are asleep.

This statute has been repealed, so far as it relates to robbing in the dwelling-house,

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some person being therein, by the 7 & 8 Geo. 4, ch. 27; and now by § 5 of 7 Wm. 4 & 1 Vict. ch. 86, (England and Ireland,) repealing the 7 & 8 Geo. 4, ch. 29, (England,) and 9 Geo. 4, ch. 45, (Ireland,) it is enacted, that "whosoever shall steal any property in any dwelling-house, and shall by any menace or threat, put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas, for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

It is further to be observed upon the passages above cited from Hale, that where an indictment for burglary includes the charge of an actual felony committed, which has been subjected to a higher punishment by statute, it need not conclude "*contrà formam statuti*." *A fortiori*, where a statute has reduced the punishment. This rule is, however, subject to the proviso, that the felony charged in the indictment was a felony before, for if otherwise it would be necessary to conclude "contrary to the form of the statute." "If an offence," says Hale, "were felony at common law, but a special act of parliament ousts the offender of some benefit (that the common law allowed him) when certain circumstances are in the fact, though the body of such indictment must express those circumstances, according as they are prescribed in the statute, yet the indictment must not conclude '*contrà formam statuti*.'" 2 Hale, P. C. 190. "But if a statute only makes an offence, or alters an offence from one crime to another, as making a bare misdemeanor a felony, the indictment for such new made offence, or new made felony, must conclude '*contrà formam statuti*,' or otherwise it is insufficient." 2 Hale, P. C. 192. And with this passage from Hale, accords the case of Ann Davis, given in Kelyng, p. 32.

"At the gaol delivery for Newgate, holden 31st August, 16 Car. 2, my Lord Bridgeman, myself, and my brother Wyld, recorder of London, being present, Ann Davis was indicted for murdering her male bastard child, and the indictment was not

special, as the statute is, for concealing it, etc. But the indictment was—*quod infantem masculum vivum parturit, qui quidum infans masculus adtunc et ibidem vivus existens natus per legem hujus regni Angliæ spurius fuit, Anglicè, 'a bastard,'*—and then goeth on in the ordinary form, that she murdered it, and doth not conclude '*contrà formam statuti*.' And it was doubted by us, whether the indictment ought not to be special; and we caused precedents to be searched, and in 2 Car. 1, there was a special indictment, but after 4, 5 and 6 Car. 1, all the indictments were as this is. And Mr. Lee, Clerk of the Peace for London, said that the form was altered, and made as it is now by the advice of the judges, at that time; who agreed that that clause which is now in the indictment should be put in, and to conclude generally, *contrà pacem*, etc., and not to conclude, *contrà formam statuti*; for murder was an offence at common law, and the statute declareth, that where the child is concealed, it shall be taken to be born alive; and if it be dead, it shall be taken that it was murdered, and so the statute doth not make a new offence, but maketh a concealment to be undeniable evidence that she murdered it, and so the court was satisfied, and went on upon the indictment." *Davis's case*, Kelyng, 32. See also Hawkins, P. C. 2, ch. 25, § 116.

It has been decided in a late case, that the alterations made in the law with respect to burglary by the statute 7 Wm. 4 & 1 Vict. ch. 86, as to the hours constituting night, and as to the punishment, do not make it necessary for an indictment for burglary to conclude "*contrà formam statuti*," as the alteration with respect to the hours does not alter the offence itself, and the mere diminution of the punishment does not make that conclusion of the indictment necessary.

"The prisoners were indicted before Mr. J. Erskine, at the Oxford Spring Assizes, 1843, for burglary. The indictment was in the usual form, charging a burglary with intent to steal, and an actual larceny, but did not conclude '*contrà formam statuti*.' Lee, for the prison-

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ers, submitted that the judgment ought to be arrested, because the indictment did not conclude contrary to the form of the statute. He cited Archbold, *Crim. Pl.* (9th ed.) p. 56. *Secker*, for the prosecution, cited *Regina v. Blea*, 8 Carrington & Payne, 735.

"ERSKINE, J. I have considered the objection to this indictment, and am of opinion that the indictment is sufficient. By it the prisoners are charged with burglary, the indictment being in the old form, charging a breaking and entering a dwelling-house with intent to steal, and stealing certain goods, and the objection is, that it does not conclude 'contra formam statuti.' The objection was put in two ways; first, on the ground that a recent statute had altered the offence; and secondly, that the punishment had been altered. On the first ground it was said, that the statute 7 Wm. 4 & 1 Vict. ch. 86, had altered the offence by substituting the hours *nine* and *six* for the old hours, and that, therefore, the 'contra formam statuti' became necessary. It appears to me that the offence is not altered by the statute. Burglary is the breaking and entering a dwelling-house in the night time with intent to commit felony. The common law fixed the test of night as being, when a man's features could not be discerned. This was found to be inconvenient, and the legislature, by the statute 7 Wm. 4 & 1 Vict. ch. 86, § 4, has enacted, 'that so far as the same is essential to the offence of burglary, the night shall be considered, and is hereby declared to commence at nine P. M., and to conclude at six A. M. on the next succeeding day.' This does not at all alter the offence; and, therefore, on that ground the present indictment need not conclude 'contra formam statuti.' The other ground for the objection was, that the punishment was altered by the statute, and a passage from Mr. Archbold's work on the criminal law was cited, as showing that any alteration of the punishment made the conclusion 'contra formam statuti,' essential to the indictment; and if that passage had been a correct transcript of the passage in Lord Hale, it would seem that the conclu-

sion, 'contra formam statuti,' was required, even when the punishment was reduced; and if that were so, the indictment for burglary, horse-stealing, larceny, and several other offences preferred within the last few years, have been all bad. However, on referring to the passage in Lord Hale, it does not appear to me to point to a case like this, as Lord Hale says: 'If an offence be at common law, and also prohibited by statute, with a corporal or other penalty, yet, it seems, the party may be indicted at common law, and then, though it conclude not 'contra formam statuti,' it stands as an indictment at common law, and can receive only the penalty that the common law inflicts in that case. Thus, an indictment for a riot is good, though it conclude not 'contra formam statuti,' because a riot is an offence at common law, though prohibited also by acts of parliament under severer penalties. This appears to apply to a case where there had been a common-law offence, and a statute has afterwards prohibited that offence, and given a new punishment. The statute 7 Wm. 4 & 1 Vict. ch. 86, merely alters the punishment by reducing it, and the words of the statute are, 'that whosoever shall be convicted of the crime of burglary, shall be liable to be transported,' etc. And not, 'whosoever shall break and enter a dwelling-house in the night time with intent to steal, shall be transported,' etc. I am, therefore, of opinion, that this statute, not having altered the offence, and not having prohibited the offence, but merely having reduced the punishment, it is not necessary that the indictment shall conclude 'against the form of the statute,' and the present indictment for burglary is, therefore, good." *Regina v. Polly*, 1 Carrington & Kirwan, 77.

In a note to the above case the reporter adds, that he had been informed by Mr. Keating, that in the case of *Regina v. Andrews*, for horse-stealing, tried before Alderson, B., at the Oxford Summer Assizes, 1839, he took a similar objection to the indictment, which, after time taken to consider, was overruled by the learned baron. The case of *Regina v. Blea*, referred to in *Regina v. Polly*, by the coun-

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sel for the prosecution, was decided on a similar point.

"The prisoner was indicted before Mr. J. Patteson, at the Oxford Spring Assizes, 1839, for a larceny committed after a previous conviction. The indictment, after alleging the subsequent felony, stated, that the prisoner at a former assize held at Oxford, was convicted of felony. *Greaves*, (*amicus curiæ*), mentioned that at the preceding Hereford Sessions, an objection had been taken by J. W. Smith to a precisely similar indictment that it had not concluded '*contra formam statuti*,' which he submitted was essential, to enable the court to inflict the heavier punishment under 7 & 8 Geo. 4, ch. 28, § 11, and that the objection had been overruled by the court, who were, however, anxious to know if they had done right.

"PATTESON, J. I do not think there is any thing in the point. The indictment is clearly good." *Regina v. Blea*, 8 Carrington & Payne, 735.

But where the felony charged in an indictment for burglary, as either actually committed, or intended to be committed, is not a felony at common law, but is made so by statute, it is necessary that the indictment should conclude "*contra formam statuti*." "In the case of *Rex v. Pearson*, Old Bailey, May, 1831, where an indictment charged the prisoner with stealing a bank-note, upon which charge he was found guilty, judgment was afterwards respited by Littledale, J., upon its having been ascertained, that the counts, charging a common larceny of the note, did not conclude '*contrary to the form of the statute*,' and the case was reserved for the consideration of the fifteen judges, who held those counts bad on that account." *Regina v. Pearson*, 5 Carrington & Payne, 121; 4 Carrington & Payne, 578.

Applying this case to an indictment for burglary, to break and enter a dwelling-

house by night, to steal a bank-note, or other security for money, would clearly not have been burglary at common law, for to constitute burglary there must have been a felony either actually committed, or intended to be committed; but to steal a bank-note was no felony at common law; the statute, therefore, made the stealing of a bank-note a felony. And according to Hale, where the statute creates a new felony, there the indictment must conclude "*contra formam statuti*." Therefore an indictment for burglary charging an intent to steal a bank-note, or charging the actual stealing of it, must conclude "*contra formam statuti*." Mr. Archbold, however, thinks that such conclusion is not necessary as to the burglary. He says: "If bank-notes or other valuable securities be stolen, conclude against the form of the statute, etc., for although this is not necessary as to the burglary, yet if that part of the charge fail, such a conclusion would be deemed to be necessary, in order to convict for the larceny." Archbold, *Crim. Pl.* §16, (11th ed.) Therefore, *quære*.

The passages cited at length from Hale, have furnished us with the above observations relative to the care necessary to be taken in drawing indictments for burglary, both at common law and under the statute. The difficulty of the subject gave rise to the solemn recommendation of the judges in *Furnival's case*, following the advice of Lord Hale, that in indictments for burglary, both the intention to commit felony, and the felony actually committed, should be charged; nevertheless, an indictment laying the intent only, or the actual felony only, is still good, if it be made out by the evidence.

In other points, indictments for burglary follow the same rules as govern other indictments.

H.

Indictment — Aider by Verdict.

REGINA v. WATERS.¹

January 30, 1849.

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The prisoner was charged in the first count, "that she in and upon a certain infant female child born of the body of her the said S. W. and of tender age, to wit, of about the age of two days, and not named," feloniously made an assault, &c., and caused to take poison, and so murdered her.

In the second count, "that the said S. W. in and upon the said infant female child so born of the body of her the said S. W. and not named as aforesaid, &c., feloniously did make an assault, and that she, the said S. W., the said infant female child in and upon a heap of ashes, &c., wilfully, &c., did cast, &c., and did then and there leave the said infant female child, &c., in the open air, &c., exposed to the cold air, &c., of which said exposure and of the chilling thereby caused, the said infant female child then and there died, and so, &c."

Held, 1. That there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot.

That the words "said infant female child so born of the body of her the said S. W." did not incorporate by reference the description of the child given in the first count, namely, that it was of tender age.

3. That the second count was, therefore, defective in not showing that the child was able to take care of itself.

4. That had the act of the prisoner charged in that count been a nonfeasance, the indictment would have been bad after verdict.

5. That as it was a misfeasance, and the death of the child was alleged to have been caused thereby, the defective statement in the indictment must be taken to be supplied by the verdict.

THE prisoner was tried before Mr. Baron ROLFE, at the December session of the Central Criminal Court, A. D. 1848, on a charge of murder.

The first count of the indictment charged that the prisoner, "in and upon a certain infant female child, born of the body of her, the said Sarah Waters, and of tender age, to wit, of about the age of two days, and not named," feloniously and of her malice aforethought, did make an assault, and it then went on to charge that she caused the child to take poison, and so murdered her.

The second count of the indictment was as follows: And the jurors aforesaid, upon their oath aforesaid, do further present that the said Sarah Waters afterwards, to wit, on the day aforesaid, and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and

¹ 1 Denison, C. C. 356; 3 Cox, C. C. 300; Temple & Mew, C. C. 57.

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upon the said infant female child, so born of the body of her the said Sarah Waters, and not named as aforesaid, in the peace of God and our said lady the Queen, then and there being feloniously, wilfully, and of her malice aforethought, did make an assault. And that the said Sarah Waters, with both her hands the said infant female child, in and upon a certain heap of dust and ashes, there situate and being in the open air, there feloniously, wilfully, and of her malice aforethought, did cast and throw; and that the said Sarah Waters feloniously, wilfully, and of her malice aforethought, did then and there leave the said infant female child, in and upon the said heap of dust and ashes in the open air, there, as aforesaid, exposed to the cold air for a long space of time, to wit, for the space of twelve hours, by means of which said exposure¹ to the cold air, as aforesaid, the said infant female child became mortally chilled, benumbed, and frozen in her body, of which said exposure to the cold air, and of the mortal chilling, benumbing, and freezing in her body thereby occasioned, the said infant female child then and there died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Sarah Waters, the said infant female child, in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our said lady the Queen, her crown and dignity.

The prisoner was also charged, on the coroner's inquisition, as follows:—

That Sarah Waters, late of the parish of St. Mary, Whitechapel, in the county of Middlesex, on the 21st day of November, in the year aforesaid, at the parish last aforesaid, in the county aforesaid, the said female child from her body, by the providence of God, did bring forth alive; and that the said Sarah Waters, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, afterwards, to wit, on the 22d day of November, in the year aforesaid, at the said parish of St. George, Hanover Square, in the said liberty in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, in and upon the said female child so alive, and in the peace of God and of our said lady the Queen, then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said Sarah Waters, the said female child so being alive, then and there did take and carry to a certain dung-hole, in a certain mews there situate, and the said female child, so being alive, then and there feloniously, wilfully,

¹ Conf., *Regina v. Ridley*, 2 Campb. 653, *quære*, the soundness of the dictum of Lawrence, J., respecting the effect of the word "exposed."

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and of her malice aforethought, in the said dung-hole did hide, secrete, and conceal, and the said female child, so being alive, and so being hidden, secreted, and concealed, she, the said Sarah Waters, then and there feloniously, wilfully, and of her malice aforethought, did desert and leave exposed to the inclemency of the weather, and the said female child, so being alive, and so being hidden, secreted, and concealed, to nourish, sustain, and support, she, the said Sarah Waters, feloniously, wilfully, and of her malice aforethought, did then and there wholly neglect and refuse. By means of which said hiding, secreting, concealing, and deserting, and leaving exposed to the inclemency of the weather, of the said female child by the said Sarah Waters, and also, by reason of the said neglect and refusal of the said Sarah Waters, the said female child to nourish, sustain, and support, the said female child then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Sarah Waters, her the said female child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder against the peace of our said lady the Queen, her crown and dignity.

At the trial the jury found the prisoner guilty of manslaughter, on the second count only of the indictment, and also on the coroner's inquisition.

A motion was made, in arrest of judgment, on the ground that the second count of the indictment stated no crime, that the age being laid under a *videlicet*, it was consistent with all which is stated in the count, that the child might be of the age of twenty years, and capable of taking care of herself, and so able to have prevented the ill effects of the exposure, which is the sole cause of death alleged.

The learned baron thought the objection good, and did not think it safe to rely on the coroner's inquisition, because the name of the child is not there stated, nor any reason given for its omission, and even in the indictment it seemed to him doubtful, whether the statement that the child had not been named was sufficient to dispense with the statement of its name, for there was nothing to show that it might not have acquired a name by reputation.

As to the necessity of stating the name, see *Regina v. Biss*, 2 Moody, C. C. 93, and *Regina v. Stroud*, 2 Moody, C. C. 270.

The learned baron requested the opinion of the judges whether either the second count of the indictment or the coroner's inquisition, were sufficient to warrant a judgment for manslaughter.

On the 20th January, 1849, the case was argued before Lord DENMAN, C. J., PARKE, B., ALDERSON, B., COLTMAN, J., COLERIDGE, J.

Clerk, for the Crown. (The arguments are fully given in the judg-

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ment. *Regina v. Willis*, 1 Denison, C. C. 80, was cited. It was also said, that in the indictment the prisoner was averred to be a single woman, though this averment did not appear in the case as stated to the court.

Afterwards, on 30th January, 1849, POLLOCK, C. B., PARKE, B., ALDERSON, B., ROLFE, B., PLATT, B., being present, PARKE, B., after stating the facts of the case, read the following judgment.

If the second count of the indictment had charged the prisoner with causing the death of the deceased by a mere nonfeasance — the neglect of her maternal duty towards her child, it would have been bad; because the indictment ought to have stated the child to be of such an age, or in such a situation as to be unable to take care of itself. Supposing an averment that the child was of tender years would have imported such an inability, there is no averment in this count that the child was of tender years, for the reference in the commencement of it to the first count does not import that description. It contains no more than an averment that the child was a female, born of the prisoner's body and not named. See opinion of Mr. Justice Patteson, *Regina v. Martin*, 6 C. & P. 217.¹

But this count charges the prisoner with a misfeasance, a wrongful act in assaulting the child, and casting and throwing her on a dust heap, and if the death of the child is traced to this act, the offence of manslaughter is complete.

It is then traced to this wrongful act?

It is alleged that the prisoner having cast and thrown the deceased on the heap of dust, left her there, that is, permitted her to continue there, exposed to the cold air, by means of which exposure she was benumbed and died.

The exposure therefore is charged against the prisoner, and the death is attributed to the exposure.

It is not expressly averred in this case, that the child was of such tender years, or so feeble that she could not walk away and take care of herself — but that is implied, for if she had been sufficiently old, or strong to do so, the death would not have arisen from the exposure by the prisoner, but from the act of the child in not walking away and taking care of herself. Thus, it is established, that if, in an action on the case, a neglect is charged against the defendant, by reason whereof the plaintiff had sustained damage, the question,

¹ There the first count described the child as E. R., an infant above the age of ten and under the age of twelve years; the second count merely described her as "the said E. R." Patteson, J., held that the second count ought to have contained an express averment that the said E. R. was "then and there above the age of ten years and under the age of twelve years."

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whether the plaintiff could have avoided that damage by the exercise of ordinary care, is always open on not guilty, and after verdict, it is presumed that the jury have found the fact of the neglect, and also found that the consequential damage was not caused by the want of ordinary care in the plaintiff.¹ *Bridge v. Grand Junction Railway Company*, 3 M. & W. 248; *Goldthorpe v. Hardman*, 13 M. & W. 377; 14 L. J. (N. S.) Exch. 61.

In this case the jury could not have found the prisoner guilty, without actually negating the power of the child to take care of herself, and so to escape the consequences of the unlawful act of the prisoner; and consequently after verdict that fact must be implied.

I think therefore that the count is good in this respect.

A doubt occurred to the learned judge, whether the description of the child as being "not named," was sufficient. "Not baptized" would not have been enough, but "not named," which means that she had acquired no name either by baptism or usage, appears to be quite sufficient.

REGINA v. BUTTON.²

May 2, 1848.

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Upon an indictment for misdemeanor, it is no ground for an acquittal, that the evidence necessary to prove the misdemeanor also shows that it is part of a felony, and that the felony has been completed. Thus, upon an indictment for a conspiracy to commit larceny, and charging that, in pursuance of that conspiracy, the larceny had been committed, the defendant is not entitled to an acquittal, though the evidence proves that he was guilty of felony, the conspiracy proved making him an accessory before the fact to the crime of larceny.

The indictment charged that one C. L. was a dyer, and had in his possession vats and dye; and that the defendants were employed by the said C. L. as his servants, &c., and that it was their duty to use the said vats and dye for the profit and advantage of the said C. L., and for the dyeing, &c., of such woollen, &c., and other materials as might belong to themselves, or be entrusted to them by the said C. L. for the purposes aforesaid, and to use the vats and dye for no other purpose, and upon no other materials; and that the defendants conspired fraudulently, and without the consent of C. L., to use the said vats, &c., in the dyeing of materials not belonging to themselves, and not entrusted to them by C. L. for that purpose, and to obtain for themselves profits, and to deprive C. L. of the proper use of the said vats and dye; and that, in pursuance of that conspiracy, the defend-

¹ As to Aider by Verdict in criminal cases, see note to *Regina v. Webb*, ante, Vol. 1, p. 451.

² Court of Queen's Bench. 3 Cox, C. C. 229; 11 Queen's Bench Rep. 929.

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ants did wilfully, and without the consent of the said C. L., receive materials, and wilfully and without the consent of C. L., at his expense and with his dye, vats, &c., dye the said materials for their own profit.

Held, good in arrest of judgment; and that as it was unnecessary to prove the overt act, the objection that the offence of conspiracy was merged in a felony did not arise upon the face of the indictment; though, if it had arisen, it could not have been sustained.

INDICTMENT for conspiracy.

The third count stated, that before and at the time of the conspiracy hereinafter next mentioned, one Charles Lewis carried on the trade and business of a dyer, and had in his possession, and upon his premises, divers large vats, and large quantities of dye, and other implements necessary for the carrying on the trade and business last aforesaid, and that the defendants, James Button, George Button, William Welsford, and Thomas Cordery, were employed and retained by the said C. L. as his servants, in and about the management of the said last-mentioned trade and business. And that it was their duty, as such servants, to employ and use the last-mentioned vats, dye, and other implements, in and for the benefit, profit, and advantage of the said C. L., and for the dyeing, preparing, and working up of such woollen, silken, cotton, and other materials, as might belong to themselves, or be entrusted to them by the said C. L. for the purposes last aforesaid, and to employ and use the said last-mentioned vats, dye, and other implements, for no other purposes, and upon no other material whatsoever. And the said J. B., G. B., W. W., and T. C., on, &c., did unlawfully conspire, combine, confederate, and agree, together and with other persons, whose names are to the jurors unknown, fraudulently and without the consent of the said C. L., to use and employ the said vats, dye, and other implements, in and about the dyeing, preparing, and getting up of divers large quantities of woollen, cotton, and silken materials, not belonging to themselves, and not entrusted to them by the said C. L. for that purpose; and to obtain and acquire to themselves, by the means last aforesaid, divers large profits and advantages, and to deprive the said C. L. of the proper use and benefit of the said last-mentioned vats, dye, and other implements. And that the said J. B., G. B., W. W., and T. C., did, in pursuance of the said last-mentioned combination, conspiracy, and agreement, on, &c., wilfully and without the consent of the said C. L., receive and take into their possession divers large quantities of material, that is to say, 1,000 yards of woollen materials, 1,000 yards of linen materials, 1,000 yards of fustian materials, 1,000 yards of cotton materials, 100 yards of leather, 100 yards of fur, 100 yards of mohair, and 1,000 yards of silken materials, and did wilfully and without the consent of the said C. L., at his expense and with his aforesaid dye, vat, and other im-

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plements, dye and prepare, and cause, permit, and procure to be dyed and prepared, the said last-mentioned large quantities of materials; and for their own profit and advantage, to the great damage of the said C. L., and against the peace of our said lady the Queen, her crown and dignity.

Fourth count charged, that before and at the time of the conspiracy hereinafter mentioned, the said C. L. carried on the trade and business of a dyer, and that the said J. B., G. B., W. W., and T. C. had engaged themselves, and were employed and retained by the said C. L. as his servants, in and about the management of the said trade and business on his behalf, and for certain wages to be paid to them, which had before that time been agreed upon. And that the said J. B., G. B., W. W., and T. C., on, &c., did amongst themselves, and with divers other persons, whose names are to the jurors unknown, unlawfully conspire, combine, confederate, and agree, by artful means and devices, to obtain and acquire to themselves divers large sums of money, by fraudulently and without the consent of the said C. L., using the dye and implements of trade of the said C. L., in and upon the dyeing and otherwise preparing and working upon of divers large quantities of woollen, cotton, linen, and other materials, for their own use and benefit, and to the injury and loss of the said C. L., in his last-mentioned trade and business. And that the said J. B., G. B., W. W., and T. C., in pursuance of the said last-mentioned conspiracy, combination, and agreement, to wit, on, &c., wilfully and without the consent of the said C. L., receive and take into their possession divers large quantities of materials, that is to say, 1,000 yards of woollen materials, 1,000 yards of linen materials, 1,000 yards of cotton materials, 100 yards of leather, 100 yards of fur, 100 yards of mohair, and 1,000 yards of silken materials, and did wilfully and without the consent of the said C. L., at his expense and with his dye, vat, and other implements, dye and prepare, and cause, permit, and procure to be dyed and prepared, the said last-mentioned large quantities of materials, for their own profit and advantage, to the great damage of the said C. L., and against the peace of our lady the Queen, her crown and dignity.

Plea, not guilty. At the trial, at the sittings after Michaelmas Term, 1846, before Mr. Justice ERLE, it was proved that the defendants were in the employ of the prosecutor, who was a dyer, and had, with the dye and materials belonging to him, on various occasions, dyed for persons who brought goods to be dyed, and received the money for their own use. It was then objected that the facts proved a felony; for that it was either a larceny of the dyeing materials, or an embezzlement of the money received for the dyeing; and that the misdemeanor charged was merged in the felony. His lordship over-

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ruled the objection, and the jury returned a verdict of guilty. A rule was subsequently obtained on the ground of misdirection, and also in arrest of judgment; against which, January 12,

Sir *F. Thesiger*, *Ballantyne*, and *Peacock* showed cause. The objection is, that, inasmuch as by the felony being afterwards committed in pursuance of the conspiracy, the defendants became accessories before the fact, and guilty of felony, the misdemeanor, therefore, merged in the felony. Even assuming that the evidence proved a felony, the objection cannot be maintained. The doctrine of merger is one for which little authority can be found at common law. The only way in which it could be solemnly decided would be in a plea of *autrefois acquit* or *autrefois convict*; but there is no such authority. In *Regina v. Cross*, 1 *Ld. Raym.* 711, the question arose upon the effect of a statute creating an offence. It was an indictment for a misdemeanor for receiving stolen goods, and judgment was arrested on the ground that, by 3 & 4 *Will. & M. ch. 9, § 5*, the offence had been declared a felony, and could no longer be treated as a misdemeanor. It is difficult to assign a reason for the doctrine. Was it supposed that the crown might lose the forfeiture? In *Regina v. Neale*, 2 *Car. & K.* 591, the prisoner was indicted for a misdemeanor, in having carnally known a child under twelve years of age. The jury found that he effected his purpose by force, and against the child's consent, but the fifteen judges held that he might be convicted of the statutable misdemeanor, although another offence, being a felony, was also proved to have been committed. *Isaac's case*, 2 *East, P. C. ch. 21, § 8, p. 1031*, will be cited on the other side, but that cannot be supported since *Regina v. Neale*. There the prisoner was indicted for a misdemeanor in setting fire to a house in his own occupation, contiguous to other houses. The evidence proved that he had set fire to his house for the purpose of defrauding an insurance company, and was, therefore, also guilty of a felony. Mr. Justice Buller held, that the misdemeanor was merged in the felony, and directed an acquittal. In *Rex v. Story*, *Russ. & Ry.* 81, the prisoner was indicted for a misdemeanor in obtaining money under false pretences, and the evidence was, that he had pretended to the post-mistress, from whom he received the money, that he was John Story, to whom a money-order was payable, and that he signed a receipt in his own name. *Chambre, J.*, doubted whether the signature amounted to a forgery, but said, that if it was, "the lesser offence would have been merged." The judges, however, held that there was no forgery, and the point, therefore, was not decided. In *Rex v. Evans*, 5 *Car. & P.* 333, the prisoner was indicted for obtaining goods under false pretences as a misdemeanor, and the

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evidence proved that he had uttered a forged request for the delivery of the goods; and Mr. Justice Taunton directed an acquittal on the ground of merger. But that case is distinguishable, as the offence was made a felony by 11 Geo. 4 and 1 Will. 4, ch. 66, § 10; and therefore, in effect, it is declared not to be a misdemeanor. But even if the doctrine of the merger should be held to be applicable, where the *corpus delicti* is single, it does not apply in the present case. To establish the charge of conspiracy, no acts need be proved; and how, then, can that which is done subsequently alter the nature of the offence already committed?

[LORD DENMAN, C. J. If indicted for the conspiracy, is the defendant to purge himself by committing a felony?]

That must be contended, if the conspiracy in this instance is to be held to be merged.

[PATTERSON, J. Suppose A., B., and C. were indicted for conspiring to murder D., and there was the evidence of some one who overheard them consent to the murder, and that they afterwards were seen to commit the murder, could they be convicted of the conspiracy?]

LORD DENMAN, C. J. What would be the form of application to prevent the conviction? Is it a matter for the jury, who are empanelled to decide aye or no whether a particular offence has been committed, that another offence of a higher nature has been committed?]

There is no such plea as that the conspiracy gave rise to a felony being committed. The party might be convicted of the conspiracy before the felony was committed, and could the felony then merge the prior offence? It is submitted, therefore, that the defendants were properly convicted of the conspiracy. The second objection is, that the indictment does not show an offence. The 17 Geo. 3, ch. 56, § 17, after reciting that journeymen dyers and apprentices and servants frequently abused the trust reposed in them, by dyeing goods for their own profit, or without the consent of their masters, provides, that "if any person employed as a journeyman dyer, or as servant or apprentice in dyeing any felt or woollen, &c., shall, without the consent of his master, &c., wilfully dye any of the said materials, or shall without such consent wilfully receive any such materials for the purpose of dyeing the same," he shall be subject to certain penalties. It is objected, that it is not alleged that the goods were not the goods of the defendants themselves, or of Lewis; but this is an allegation of an overt act, which may be rejected altogether; but even if the goods were the goods of the defendants themselves, the defendants used them for purposes for which they had no right to use them. It is also objected, that there is no duty of the defendants

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alleged, but this is quite unnecessary. *Rex v. Gill*, 2 B. & Ald. 204, was cited.

January 18. *Allen*, Sergeant, and *Huddleston*, contra. This is an indictment for conspiracy, but the overt acts set out in the indictment show that the defendants were guilty of larceny. If those acts had been done in pursuance of their duty, it would have been embezzlement.

[ERLE, J. Each man was authorized to dye goods of his own, and the goods fraudulently dyed were represented to be their own.]

That would only make the proof of the larceny more difficult; the question of fact would be, whether the articles dyed were the property of the servant? If not, then it would be the case of a fraudulent appropriation by a servant of his master's property to his own use, which is larceny; it makes no difference that there was a limited permission to use the dye, if the limits of that permission are overstepped. Persons who conspire to steal are accessories before the fact to felony, and therefore felons. In *Foster's Crown Law*, 126, it is said, "The best writers on the Crown Law agree, that persons procuring, or even consenting beforehand, are accessories before the fact." That being so, the rule is here applicable, that where on an indictment for misdemeanor the evidence necessarily proves a felony, the misdemeanor is merged in the felony. That rule applies in every case where the evidence necessary to prove the misdemeanor proves the felony; it perhaps does not apply where incidental and extraneous evidence, not necessary to prove the misdemeanor, discloses that a felony has been committed. The same state of facts must prove both the felony and the misdemeanor. In *Regina v. Cross*, 1 Ld. Raym. 711, the principle, that a misdemeanor merges in a felony, was not questioned either at the bar or by the bench; and, indeed, in all the old cases the question appears to have been, not whether the doctrine was sound, but whether it was applicable to the particular case. The case of *Sir S. Procter v. Darnbrook*, Hob. 138, is quite in point. That was a proceeding in the Star Chamber for riot, and the court refused to entertain it, because it appeared that one hurt in the riot died within three months, and ordered an indictment for murder to be preferred. It is true, that an acquittal of the felony would be no answer to a subsequent indictment for the misdemeanor; but that does not affect the principle, because in that case the assumption is that no felony has been committed, but the smaller offence of misdemeanor may have been committed. No question of merger arises. In *Foster's Crown Law*, (p. 373, ch. 3, § 6 of the 3d Discourse,) it is said: "By the 3 & 4 Will. & M., and by 5 Ann, receivers of stolen goods, knowingly, are

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made accessories after the fact; and by the 4 Geo. 1 they are liable to be transported for fourteen years. Before the statute of King William, receivers, unless they likewise received and harbored the thief, were guilty of a bare misdemeanor, for which they were liable to fine and imprisonment, or other corporal punishment. But that act having made them accessories, and consequently felons, the prosecuting them as for a bare misdemeanor was holden by all the judges, at a conference about the latter end of King William's reign, to be improper and illegal; for the misdemeanor was merged and absorbed in the crime of felony, just as felony at common law, when made high treason by statute, which hath been done in a few cases, is merged and absorbed in the treason." And *Isaac's case*, 2 East, P. C. ch. 21, § 8, p. 1031, supports the same principle. It is an express decision in the point, by Buller, J. In *Rex v. Story*, Russ. & Ry. 81, it was assumed that if the prisoner's offence amounted to forgery, he could not have been convicted of the lesser offence. Hence the necessity of considering whether he had or had not committed forgery. *Rex v. Evans*, 5 Car. & P. 553, was a similar case; and the prisoner was acquitted by Taunton, J., because he had obtained the goods by means of a forged request, and ought, therefore, to have been indicted for forgery.¹ So the same course was adopted, for the same reason, by Parke, B., and Coltman, J., in *Regina v. Anderson*, 2 Moo. & Rob. 469, although there the same argument in effect was urged as here; and it was said: "Even admitting that the prisoner has been guilty of a felony by forging this instrument, the offence for which he is now indicted is distinct. The felony is complete when the instrument is counterfeited; the misdemeanor is not committed until the money is obtained by means of it; it is a subsequent independent offence, and would not merge in the antecedent felony." It is said that the authorities in support of this doctrine are few; but the reason is that it has never been questioned. The general acknowledgment of the principle is proved by the proviso to § 53 of 7 & 8 Geo. 4, ch. 29, (the Statute of False Pretences,) which is in these words: "Provided always, that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor." The

¹ In Russell on Crimes, (ed. Greaves,) Vol. II. p. 309, it is thus laid down, on the authority of the passage from Foster, p. 373: "Where the goods are obtained by a forged instrument, which falls within the class of instruments the forging of which is made felony by statute, the indictment must be for forging the instrument, as the misdemeanor is merged in the felony."

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object of that provision being to avoid the consequences of the doctrine for which these defendants now contend. It has been asked, upon what reason or principle does the doctrine rest? The reason mentioned in *Regina v. Cross*, and the true reason, is, that no man is to be harassed by frequent prosecutions for the same offence. *Nemo debet bis puniri pro uno delicto*; and that might be the case unless the misdemeanor is merged in the felony, because a conviction of the misdemeanor could not be pleaded to a subsequent indictment for the felony. The reason of which, given by Hawkins, 2 Pl. Cr. ch. 35, § 5; ch. 36, § 7, is, that the judgments are different. The case of a conspiracy to murder, and a murder in pursuance of the conspiracy, has been suggested. That would involve four distinct offences: 1. The conspiracy; 2. An attempt to commit murder; 3. An assault; and 4. Murder; but would a conviction or acquittal of the conspiracy or the attempt or the assault be pleadable, in answer to the charge of murder? Clearly not. Public policy requires that the judge should interfere to stop a prosecution for misdemeanor when the facts prove a felony. Misdemeanors may be compromised; and if the argument on the other side should be upheld, a murder might be indicted as a misdemeanor and compromised, and then the conviction afterwards pleaded in answer to a charge of murder. In civil actions, the plaintiff cannot recover unless the form of his declaration is strictly correct; because judgment recovered in a wrong form of action could not be pleaded in answer to a subsequent action in the right form. The principle is stated in *Luttrell's case*, 6 Mod. 77, which is thus shortly reported: "By Holt, C. J., at Nisi Prius, *ut audivi*, this difference was taken; if a civil action be brought, as trover for goods, after recovery, you may indict him for trespass or felony for the same taking, because the offences or causes of action are of a different nature, the one civil and the other criminal; but if the first prosecution had been criminal, as an indictment for trespass, &c., and the crime appears to be felony, then you cannot have verdict or judgment on the indictment for trespass, it being the inferior. And this, he said, had been adjudged in Mr. *Luttrell's case*." The case of *Regina v. Neale*, 1 Den. C. C. 36; 1 Car. & K. 591, is mainly relied upon by the other side; but, in the first place, that case was not argued; and, in the second, it is distinguishable from the present. The evidence which proved the felony was not necessary to prove the misdemeanor. Something extraneous was elicited by cross-examination, after the case for the prosecution had been clearly proved; and it was only in consequence of that extraneous piece of evidence that any felony appeared to have been committed. Besides the offence, there was a misdemeanor created by a particular statute, which, in effect, excluded the operation of the doctrine of merger.

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[ERLE, J. Then do you say that the prisoner might have been convicted of the misdemeanor first, and afterwards of the rape, and punished for both?]

Yes; that seems to be the effect of the particular statute 9 Geo. 4, ch. 31, §§ 16, 17.

[ERLE, J. Is not an assault with intent to commit a rape a statutable misdemeanor? And would you say that there might be a double conviction — first of the misdemeanor, and then of the rape?]

No; because the assault is an offence at common law, and is included in the rape. When the minor offence is a necessary constituent of the larger, then the former is merged in the latter. In the present case, the defendants were accessories before the fact to a felony, and therefore felons by the very same act, which is the misdemeanor charged. In *Regina v. Neale*, more evidence was necessary to convict of the felony than of the misdemeanor.

[PATTESON, J. And different evidence; the age of the girl was necessary to be proved upon the indictment for misdemeanor; it would not be necessary in an indictment for the felony.]

How would it be possible for the prisoner in that case to have pleaded *autrefois convict* to a charge of rape? On the face of them, the two indictments would be quite different. In the first indictment, there would be no statement that the act was done against the will of the child. Upon these grounds, it is submitted that the judge at the trial ought to have directed an acquittal. Secondly, in arrest of judgment the third and fourth counts disclose no offence. 1st. They do not negative that the material dyed belonged to the defendants; and as it appears that the defendants had the right of dyeing materials belonging to themselves, that negative averment is essential. The word "fraudulently" will not help it. *Regina v. Peck*, 9 Ad. & El. 686; *Rex v. Seward*, 1 Ad. & El. 706; 1 Burn's Justice, 973; *Fletcher v. Callthrop*, 6 Q. B. 880; *Regina v. Richardson*, 1 Moo. & Rob. 402.

[ERLE, J. The offence charged is a conspiracy to dye materials not belonging to themselves; and it is not necessary to set out overt acts to make a valid charge of conspiracy.]

Not if the charge is by itself sufficient. *King v. The Queen*, 7 Q. B. 795. But it is not sufficient here. A good charge of conspiracy must be, either to commit an illegal act or a lawful act by illegal means. *Rex v. Seward*, per Lord Denman, C. J., 1 Ad. & El. 713. Here there is no allegation that the means were illegal; the question, therefore, is, whether the act was illegal. 17 Geo. 3, ch. 56, § 17, is referred to; but that is repealed by 6 & 7 Vict. ch. 40, § 1.

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[ERLE, J. Section 34 of that act explains the manufactures, trades, occupations, and employments, to which the act is to extend; and dyeing is not amongst them.]

But § 35 (the interpretation clause) applies the word "manufacture" to all "operations and employments connected with or incidental to the manufacture of any of the said materials, or any parts, branches, or processes thereof." Even if the 17 Geo. 3, ch. 56, § 17, is not repealed, that section is not followed in either of the counts, for the term "wilfully" is omitted. It is said, that in the fourth count the relation of master and servant is shown; and that an implied duty arises from that relation, which sufficiently shows the act of the defendants to have been unlawful; but the particular duty ought to be distinctly stated in the indictment, to lay the foundation of the offence subsequently charged. No indictment will lie for a conspiracy to kill game, or to commit any other civil trespass. *Rex v. Turner*, 13 East, 228. Or for a conspiracy to sell a man an unsound horse by false warranty. *Regina v. Pywell*, 1 Stark. 402. Or for a conspiracy to exonerate one parish from the charge of a pauper and to throw it on another, or for that purpose to cause a male pauper to marry a female pauper. *Rex v. Seward*, above cited. Nor for a conspiracy to cheat and defraud a party of the fruits of a contract. These cases illustrate the sort of unlawful act which must be the object of the conspiracy. Here there may have been a contention between the master and the servants as to the extent of the permission which he had given them. Again, the statute 17 Geo. 3, ch. 56, § 17, applies only to dyers of certain particular materials; and these counts are bad for not showing that Mr. Lewis, the prosecutor, was a dyer within the act. The dye and instruments are not alleged to be the property of Lewis, nor are the defendants described as "journeymen dyers," which is the term used in the statute. The counts charge the defendants with using the dye and implements of trade of Lewis; but they do not negative that they paid him for them, nor allege that it was done with intent to defraud him.

[ERLE, J. The third and fourth counts charge that the defendants were retained as the servants of Lewis; and that, without his consent and at his expense, they dyed with his dye various materials for their own profit.]

The allegation, that they were retained as his servants, is without time or place. At the date of the conspiracy, they may not have been his servants. The words, "fraudulently" and "without consent," will not supply the want of positive allegations; and it is consistent with all the averments here, that they may have paid over to the master any money which they received. In *Regina v. Peck*, it

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was expressly decided that a count which charged a conspiracy to defraud persons of their debts, and, in pursuance of that conspiracy, the execution of a false and fraudulent deed, was bad for omitting to show in what respect it was false and fraudulent. Lastly, the counts ought to have concluded *contra formam statuti*, as the word "wilfully" is omitted.

Cur. adv. vult.

On a subsequent day, judgment was delivered by

LORD DENMAN, C. J. The indictment charged that the defendants, being in the employ of the prosecutor, a dyer, conspired to use the dyeing materials on articles not entrusted to them for dyeing, and not belonging to themselves or their families, and so to defraud their employer of profit. The evidence showed that the prosecutor permitted his servants to dye any articles belonging to themselves or their families, but not things belonging to others; and that the defendants had taken in articles not belonging to themselves or their families, and had dyed them for profit with the materials of their employer, and passed them off for articles within the prosecutor's permission. Several objections to the indictment and the evidence were made at the trial, and in support of the rule for arresting the judgment or for a new trial, and have been disposed of; but the objection, that the misdemeanor charged formed part of a felony, and was merged therein, and that, therefore, either the judgment should be arrested or a verdict of acquittal entered, was reserved for consideration. With respect to arresting the judgment, it is clear that the essential part of the indictment is the charge of a conspiracy; so that if the evidence proved the conspiracy, and did not prove the overt act alleged, namely, that the conspiracy was carried into effect, the indictment would have been sufficiently proved. The point, therefore, is not raised by the indictment. With respect to the evidence, we do not propose to examine the correctness of the opinion of the learned judge at the trial, that it did not prove a larceny, and that it tended rather to prove the obtaining of goods by false pretences than theft; but, assuming that the evidence to prove the conspiracy would have been sufficient to warrant a conviction, upon a charge of larceny, against principals and accessories, and that the point contended for by the defendant's counsel was raised, we have to decide whether the defendant had, therefore, a right to claim a verdict of acquittal.

The main reliance was placed on *Rex v. Cross*, 1 Lord Raym. 711, where the defendant was convicted of a misdemeanor in receiving stolen goods, knowing them to have been stolen; and the court

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decided to arrest the judgment, because the offence was a felony created by the 3 & 4 Will. & M. ch. 9, § 4, and was not indictable as a trespass; and Holt, C. J., adds, if the proceeding had been at common law, the fact charged would have been evidence that the defendant was accessory after the fact to a felony. But that case is irrelevant to the present question, which arises only in respect of felonies composed of a series of facts, where a part of the series is a complete misdemeanor. The receipt of stolen goods knowingly does not, of necessity, comprise any series of acts; on the contrary, that offence is not committed at all, unless the receipt and the knowledge are simultaneous; in which case, by the common law, they might be evidence of the defendant's assisting a felon, and so of being guilty of a felony as an accessory after the fact, and by the statute then in force those facts constituted a felony. The offence was a felony, and a felony only; and, therefore, an indictment charging it to be a misdemeanor was held wrong in law. The case does not show that a criminal, who has been guilty of a complete misdemeanor, and also of a felony comprising a misdemeanor, may set up his felony as a bar to the prosecution for the misdemeanor.

The case of *Procter v. Darnbrook*, Hob. 138, gives no support to the defendant's case, but serves to explain the principle upon which judges have acted, in the exercise of their discretion, in some cases of misdemeanor. The plaintiff was suing the defendants in the Star Chamber, for riots and for felling of woods; and his proof went to show that the defendants, in the course of their riotous acts, had committed murder; and the judges think it fit that the plaintiff should prefer a bill for murder to the grand inquest, and adjourn the further hearing of the plaintiff's suit for the riots till the question of murder should be disposed of by the proper tribunal. The jurisdiction here exercised by the judges of the Star Chamber is exercised now by the justices of oyer and terminer, who may direct one indictment to be quashed or suspended, and another preferred, as public justice may require. But the court, by making the plaintiff prosecute for the felony before he went on with his suit, gave no sanction to the notion that the defendant has any right so to interfere, and to demand an acquittal for a manifest minor offence, upon the pretext that he has a right to direct himself to be prosecuted for a graver crime. The passage cited from Foster, Discourse 3, ch. 3, § 6, relates solely to the offence of knowingly receiving stolen goods; and the observations above-made upon *Rex v. Cross*, 1 Lord Raym. 711, apply equally to show this passage to be irrelevant here.

In *Isaac's case*, 2 East, P. C. ch. 21, § 8, p. 1031, the prisoner was indicted for the misdemeanor of setting fire to his own house, whereby

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adjoining houses were in danger of being burnt; the evidence was, that he had set fire to his own house to defraud the insurance company, and that the adjoining houses had been burnt down. The judge directed an acquittal for the misdemeanor, stating that, upon these facts, the prisoner was guilty, if at all, of felony. By the law, at that time, the mere setting fire by a man to his own house was no offence; but if his house was so situate that other houses were endangered, it was a misdemeanor, being in the nature of an attempt to set them on fire. If they were burnt, it was a felony; it was a setting fire to them, every man being taken to intend the obvious consequences of his act. See the cases in 2 East, P. C. ch. 21, § 7. The learned judge who directed the acquittal, may have considered that the crime of arson consists in the one act of setting fire unlawfully; and that, after the fire has been so set, the party is responsible for its progress until it is extinguished, and that the progress decides whether such setting on fire is a felony or a misdemeanor; and that a prisoner who has committed a felony, and no other offence, cannot properly be charged with the misdemeanor of an attempt to commit it; and also he may have considered that public justice required a more signal example in a case of such guilt. On both or either of these grounds, the case is distinguished from the present. In *Rex v. Evans*, 5 C. & P. 553, and *Regina v. Anderson*, 2 M. & Rob. 469, the misdemeanor of obtaining goods by false pretences was charged, and the evidence showed the false pretence to be a felony, namely, the uttering of a forged instrument. In the first case, the judge, in the last, the prisoner, objected, that as the evidence thus showed a felony to have been committed, therefore the charge of misdemeanor failed; and two judges supported the prisoner's objection, declaring that the proper way of proceeding was by indictment for felony. It is clear, that if a misdemeanor is by statute made a felony, the indictment ought to be for felony, and these cases may have been taken to come within this rule, the first step in the misdemeanor charged being created a felony, and, if so, they are here irrelevant. But it should be observed that the misdemeanor of obtaining goods by false pretences consists of a series of acts — the false pretence and the obtaining of the goods — and that the first step in the series may also be a felony. Where that is the case, there appears no reason why the prisoner should be allowed to defeat the charge of the lesser offence, by alleging his own guilt in respect of the greater offence. The same act may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are two charges of felony; neither ought

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it to be where the one charge is of felony and the other of misdemeanor.

These being the authorities cited for the defendants, there appear none directly in their favor, and there is a decision against them. In *Regina v. Neale*, 1 Denison, C. C. 36; 1 C. & K. 591, where a charge of misdemeanor, in having intercourse with a female child between the age of ten and twelve, was held proved, and the conviction maintained by the judges, although the evidence showed that the very act charged as misdemeanor was also the felony of rape; the argument for the prosecution being, that every material allegation of the indictment was proved, and that the verdict ought to be according to truth. This is a direct adjudication, that a misdemeanor, which is part of a felony, may be prosecuted as a misdemeanor, though the felony has been completed; and the attempt, on the argument, to make a distinction between misdemeanors by statute and those by common law, was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it was obtained.

It was further urged for the defendants, that, unless this defence was sustained, they might be twice punished for the same offence. But this is not so; the two offences being different in the eye of the law. If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction. If the position contended for by the defendants was true, its application would be subject to much uncertainty; for it is not within the province of the judge, in general, to decide on the credibility of the witnesses, or the weight of the facts tending to prove a felony; but, according to the present contention, the duty of acquitting on his own opinion is cast upon him, and this conclusion of fact, in which, probably, the jury would not have concurred, is to be subject to no review. Also, if he should be satisfied that a felony is proved, and should direct an acquittal of the misdemeanor, it is obviously uncertain whether the same evidence would be given upon a prosecution for felony, or would be satisfactory to the jury, or would be left without answer. The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretence; and entire impunity has sometimes been obtained by varying the description of the offence according to the prisoner's interest, and he has been liberated on both charges, solely because he was guilty upon both.

Upon this review, we are of opinion that this conviction for a misdemeanor ought to be sustained, although the evidence proving it

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proved also that it was part of a felony, and that such felony had been completed.

Rule discharged.

In *Regina v. Simpson*, 3 Carrington & Kirwan, 207, before the Hon. J. Stuart Wortley, Recorder, Central Criminal Court, (1851,) the recorder said "that he did not think that the old doctrine of merger was upset by the two cases of *Regina v. Neale* and *Regina v. Button*; but as the question was one of importance, and some doubt prevailed about it, he would consult the judges in the other court." Afterwards, the recorder said "that he had consulted Mr. Justice Coleridge, who informed him that the judges were of opinion that the doctrine of merger was not affected by the decisions in *Regina v. Neale* and *Regina v. Button*, which turned entirely upon the words of the particular statutes on which those cases were founded."

The stat. 14 & 15 Vict. ch. 100, § 12, enacts, that "if, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony; in which case, such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." Mr. Greaves, in his edition of Lord Campbell's Acts, p. 16, says: "This section was introduced to put an end to all question as to whether, on an indictment for a misdemeanor, in case upon the evidence it appeared that a felony had been committed, the defendant was entitled to be acquitted, on the ground that the misdemeanor merged in the felony. *Regina v. Neale*, 1 Carrington & Kirwan, 591; 1 Denison, C. C. 36; *Regina v. Button*, 11 Queen's Bench, Rep. 929. The discretionary power to discharge the jury, is given in order to prevent indictments being col-

lusively or improperly preferred for misdemeanors, where they ought to be preferred for felonies; and also to meet those cases where the felony is liable to so much more severe a punishment than the misdemeanor, that it is fitting that the prisoner should be tried and punished for the felony. For instance, if on the trial of an indictment for attempting to commit a rape, it clearly appeared that the crime of rape was committed, it would be right to discharge the jury. So if any one were to prefer an indictment for any offences respecting a railway, under the 3 & 4 Vict. ch. 97, instead of under the 13 & 14 Vict. ch. 19, §§ 6, 7, it would be proper, generally speaking, to discharge the jury, and order an indictment for felony to be preferred."

In *Regina v. Shott*, 3 Carrington & Kirwan, 206, (1851,) the indictment charged the prisoner with having had carnal knowledge of a girl above the age of ten years, and under the age of twelve years, to wit, of the age of eleven years. The evidence was that the offence was committed, and that the girl was under the age of ten years. For the prosecution, it was suggested that this variance was immaterial, as by the above section of the statute, it is provided, that a person tried for a misdemeanor is not to be acquitted, if the facts, proved in evidence, amount in law to a felony. Maule, J., did not think that the section referred to applied to such a case as the present. It applied only to cases of merger; e. g., the case of false pretences, where the facts proved that the false pretences had been effected by a forgery. In such case, under that section, a prisoner might, nevertheless, be convicted. But that section only applied to cases where the indictment was proved by facts amounting to a felony. The words in the indictment being, above the age of ten years and under twelve years, were material, constituting the misdemeanor charged, and they had not been proved.

In Massachusetts, in an early case, it

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was decided, that where the conspiracy to commit a *felony* is carried into effect, the crime of conspiracy, which is a misdemeanor, is merged in the higher crime of felony. *Commonwealth v. Kingsbury*, 5 Mass. 106, (1809.) This seems to be the only case in America in which this point has been decided. But the American authorities are uniform, that if the object of the conspiracy be to commit a misdemeanor only, and it be committed, the offence of conspiracy is not merged, but is still separately punishable. *The People v. Mather*, 4 Wendell, 229, 265; *The State v. Murray*, 15 Maine, 100; *Commonwealth v. McGowan*, 2 Parsons, 341; *The People v. Richards*, 1 Manning, (Michigan), 216; 3 Greenleaf, Ev. § 90; 1 Bishop, Crim. Law, §§ 549-551. But see *contrà* a dictum of Parsons, C. J., in *Commonwealth v. Kingsbury*, *ubi supra*; and in *The People v. Mather*, *ubi supra*, Marcy, J., said: "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it cannot be merged. Where two crimes are of equal grade, there can be no legal technical merger." H.

REGINA v. EAGLETON.¹

July 9, 1855.

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The defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times as the guardians should direct, loaves of bread of three and a half pounds weight each. The guardians were, during the said term, to pay the defendant after certain rates and prices for the bread so supplied, and of which a bill of particulars should have been sent. The contract contained a proviso, that in case the defendant broke the terms of his contract in any of the ways therein named, one of which was by a deficiency in the weight stated and charged for in the said bill of particulars, the guardians might employ other persons to supply the bread, and charge the defendant with the costs of such supply above the price contracted for, and might retain any moneys due to the defendant under the contract at the time of such breach towards such costs, or the damages which the board might sustain, and might also put in suit against the defendant a bond which he then executed, and which was conditioned for the due performance of his contract.

The indictment contained ten counts, the first seven of which were in substance the same, and charged the defendant with a common-law misdemeanor, in supplying and delivering, as such contractor, loaves of bread to different poor persons, which loaves were deficient in weight, intending to injure and defraud such poor persons and to deprive them of proper and sufficient food and sustenance, and to endanger their healths and constitutions, and to cheat and defraud the said guardians.

The three last counts charged the defendant with attempting to obtain money from the guar-

¹ 1 Dearsly, C. C. 515; 6 Cox, C. C. 559; 14 Jurist, 940; 24 Law Journal, M. C. 158; 33 Eng. Law and Eq. Rep. 540.

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dians by falsely pretending to the relieving officer that he had delivered loaves of the proper weight.

It was proved in evidence, that on a poor person applying for relief, the relieving officer gave the applicant a ticket, the presentation of which to the defendant entitled him to receive a loaf; that the defendant received these tickets and gave to the poor persons presenting them loaves of bread which the jury found were deficient in weight, and were so with the knowledge of the defendant.

By the course of dealing the defendant would return the tickets in the following week, with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant in account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. The tickets were so returned by the defendant, and he was credited in account accordingly; but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor, and that by returning the tickets to the relieving officer, he intended to represent that he had delivered the loaves mentioned in them of the weights stated.

Held, 1. That the first seven counts did not disclose an indictable offence, as the delivery of loaves of less weight than that contracted for was a mere private fraud, no false weights or tokens having been used.

2. That the defendant was properly convicted on the last three counts of attempting to obtain money by false pretences, as the fraudulent representation made was of an antecedent fact; and that although the defendant had only obtained credit in account, and could not have been convicted of obtaining money by false pretences, he was nevertheless properly convicted of the attempt, his obtaining the credit in account being the last act depending on himself towards obtaining the money.

Quære, whether a sale of goods with a false representation of the weight or quality is an indictable offence?

THE following case was stated by the Recorder of Great Yarmouth:—

The defendant was tried at the Quarter Sessions for the borough of Great Yarmouth, holden on the 1st day of March, 1854, upon an indictment, a copy of which is annexed. The evidence was a contract dated 27th of December, 1852, and a bond of the same date (copies of which are also annexed); and it was proved that on poor persons applying for out-door relief, the relieving officer gave the applicant a ticket in the following form:—

31. BREAD. One Loaf. WM. HARBERT.
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The poor person, on presenting the ticket to the defendant, was entitled to receive a loaf, and could not obtain a loaf elsewhere on such ticket. As many as twenty of these tickets were given on Saturday the 21st of January last, to as many out-door poor by the relieving officer, and the poor persons, on presenting them to the defendant, received the number of loaves mentioned in the ticket. By the course of dealing the defendant would return the tickets on the

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following week, with a statement in writing of the number of loaves he had supplied, but no other particular would be delivered, and the relieving officer would credit the defendant in his books for the amount, and the money would then be paid to him at the time stipulated in the contract.

These tickets were returned by the defendant to the relieving officer, with the note of the number of loaves, and the defendant had credit accordingly.

It was objected on the part of the defendant that no one count set out an offence, and that the evidence did not support any of the first seven counts for fraud, nor the last three as an attempt to obtain money by false pretences.

The jury found that the loaves of bread furnished by the defendant, were deficient in weight, and were so with the knowledge of the defendant, and that he intended thereby to defraud the out-door poor for whose relief they had been ordered; and that in returning the tickets to the relieving officer, he intended to represent that he had delivered the loaves mentioned on them of the weight stated in the contract, and returned a verdict of guilty.

I have to request the opinion of the Court of Criminal Appeal upon the objections taken on the part of the defendant.

This case came on to be argued at a sitting of this court holden on the 28th of April, 1854, and upon that occasion the court directed that the case should be referred back to the arbitrator to state the evidence more fully with respect to the last three counts of the indictment. Subsequently, the case was accordingly amended by the addition of the following evidence.

William Wilson. The attesting witness to the contract and bond, of which copies are annexed to the case.

William Harbert, (the relieving officer for the south district,) who stated that the out-door poor, who were ordered by the guardians to be relieved by giving them bread, applied to him, as relieving officer, for a ticket which he gives in the form set forth in the case, being either for one loaf or two loaves, as ordered. That these tickets are given weekly, and the poor person takes the ticket to the contractor and receives the loaf or loaves as mentioned upon it. That the contractor in the ensuing week returns the tickets to the relieving officer giving them, with a note stating the number sent, and the contractor is credited in the account with the guardians with the weight of the bread mentioned on the tickets, and is paid at the time mentioned in the contract. That the loaves delivered to the poor should be each of three and a half pounds weight. That on the 21st day of January, the witness was the contractor. That witness on that day gave to different out-door poor persons thirty-eight tickets, thirty-two

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being for one loaf, and six for two loaves each. That Susanna Godfrey had a ticket for two loaves, Elizabeth Bowles for one, Ann Parker for two, and Elizabeth Fean for one loaf, but he could not tell to whom each ticket was delivered. That all the thirty-eight tickets given by the witness on the 21st day of January, were returned to him by the defendant on Monday the 23d day of January, with a note in the defendant's writing stating the number of tickets sent back, and witness entered them to the credit of defendant's account in the receipt and expenditure book of the guardians. That in the evening of the 21st day of January, he made inquiry of the poor persons to whom he had given tickets, as to the weight of the loaves they had received from the defendant, when he found that many of the loaves had been eaten either in part or wholly, so that the weight could not be ascertained, but that Susanna Godfrey had her two loaves, Elizabeth Bowles her one, Ann Parker one of her two, and Elizabeth Fean her one. That these were all deficient in weight, being weighed by witness or in his presence.

Susanna Godfrey. Received a ticket on the 21st for two loaves; she sent her son John with it to the defendant, and he brought her back two loaves; they were weighed in the evening and were both short in weight.

John Godfrey. Took the ticket to defendant and gave it to him, and received of him two loaves which he gave his mother.

Elizabeth Bowles. Took the ticket to defendant and gave it to him, and received one loaf; it was short in weight.

Ann Parker. Received a ticket for two loaves; she sent her son William with it to defendant and he brought her two loaves, which loaves she gave Harbert on the Monday.

William Parker. Took the ticket to the defendant and gave it to him, and received from him two loaves which he gave to his mother.

William Christmas Nutman. Relieving officer for the north district—delivered twenty-one tickets on the 21st day of January to out-door poor persons for bread; all these twenty-one tickets were returned to witness by the defendant on the afternoon of the following Tuesday the 24th, with a note in the defendant's writing stating the number of tickets sent back, but he could not tell to whom each ticket was delivered, but James Mayer, John Bowles, James Pitt, and Edward Campbell, were among the out-door poor persons to whom he gave tickets. On the same day, he gave an order to Samuel Lingwood, (who was a casual poor person,) upon defendant, for two loaves which were each to weigh three and a half pounds; that this order was returned to him on the 31st day of January, a week after defendant had been held to bail, to answer a charge of fraud; this order he knew from Samuel Lingwood's name being written by him,

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witness, on it. This witness inquired of the poor, to whom he had delivered tickets, as to the bread they had received, and obtained one loaf from Mayer, one from Knowles, one from Pitt, one from Campbell, and one from Lingwood, being all he could get, and they were all short in weight.

Samuel Lingwood. Took the order to defendant on the 21st day of January, who gave him two loaves, one he ate, and the other weighed three pounds one ounce only.

John Bowles gave the ticket to his wife Sarah Bowles.

Sarah Bowles took it to defendant and gave it to him; he gave her two loaves; she weighed one and it was short in weight nearly four ounces, and defendant afterwards gave her three pieces of bread to make up the weight.

James Mayer. Received the ticket from Nutman; took it to defendant, and left it with him; defendant gave him two loaves; one he ate, and the other he gave to Nutman.

Sarah Pitts. Received the ticket of Nutman, delivered it to defendant, and she had from him two loaves; one she ate, and the other she gave to Nutman; it was four ounces and three quarters short.

Edward Campbell. Received the ticket of Nutman and gave it to defendant and received two loaves, which he gave to Elizabeth Spanton, his mother.

Elizabeth Spanton. Gave one of the loaves to Nutman; it weighed three pounds four ounces and a half bare; the other was eaten.

The first count of the indictment alleged that heretofore, to wit, on the 3d day of December, A. D. 1853, in the parish of Great Yarmouth, &c., the guardians of the poor of the said parish of Great Yarmouth, in the county of Norfolk, duly and publicly advertised in a certain county newspaper, to wit, the *Norfolk Chronicle*, for tenders for the supply of bread made from the best household flour, at per loaf of three pounds and one half of a pound for out relief, from the 24th day of December in the year aforesaid, till the 25th day of March then next; and that thereupon John Eagleton, of, &c., baker, to wit on the 22d day of December in the year first aforesaid, duly tendered, and he then and there duly and in pursuance of the statutes in such case made and provided, and in due and full compliance with the rules, orders, and regulations made and issued by the Poor Law Commissioners for England and Wales, became and was the contractor with the said guardians for the supply to the out-door poor of the said parish at such time and in such manner as the said guardians, or any other person or persons duly authorized by them, should from time to time direct, of such quantities of bread made from the best household flour, in loaves weighing three pounds and

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one half of a pound at sevenpence per loaf, as should be required by the said guardians for the use of the out-door poor of the said parish. And that after making the said engagement and undertaking, and whilst the said John Eagleton was such contractor as aforesaid, to wit, on the 21st day of January, A. D. 1854, at the parish aforesaid, William Harbert then being one of the relieving officers of the poor of the said parish, by the orders and authority of the said guardians of the poor, then and there gave as and for relief to divers, to wit, one hundred poor persons, being out-door poor of the said parish, divers, to wit, one hundred orders and tickets signed under the authority aforesaid, by the said William Harbert, for the supply of divers, to wit, two loaves of bread to each of the said poor persons respectively. And that the said William Harbert being duly authorized in that behalf as aforesaid, then and there directed the said poor persons to produce and show, and that the said poor persons did then and there produce and show to the said John Eagleton the said orders and tickets, in order that the said John Eagleton might supply and deliver to the said poor persons respectively for their sustenance and support, the number of loaves specified in the said orders and tickets respectively. And that the said William Harbert thereby then and there, being duly authorized in that behalf as aforesaid, ordered and directed the said John Eagleton to supply and deliver to the said poor persons respectively the number of loaves of bread in the said orders and tickets respectively specified, in pursuance of and according to the terms of his said contract and undertaking. And that the said poor persons were not, nor was any or either of them authorized by the said guardians or by the said William Harbert, or by any or either of them, or by any other person whatsoever to obtain, and that the said poor persons were, and each and every of them was wholly unable to obtain the said loaves of bread or any bread whatsoever, by means of the said orders and tickets, elsewhere, or from any other baker or person whatsoever, but only from him the said John Eagleton, of all which premises the said John Eagleton then and there had notice. And that the said John Eagleton then, to wit, on the day and year last aforesaid, at the parish aforesaid, in the borough aforesaid, and within the jurisdiction of this court, so being such contractor as aforesaid, not regarding his duty in that behalf, but under color and pretence of his said contract, and contriving and intending to injure and defraud the said poor persons respectively, and to deprive them of proper and sufficient food and sustenance, and to endanger their healths and constitutions respectively, and further contriving and intending to cheat and defraud the said guardians, unlawfully and fraudulently supplied and delivered to divers, to wit, fifty of the said poor persons who then respectively produced and showed to the

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said John Eagleton the said orders or tickets as aforesaid, divers, to wit, one hundred loaves of bread, as and for loaves of bread weighing respectively three pounds and one half of a pound each loaf. Whereas the said loaves respectively, as he the said John Eagleton then well knew, were not of the weight of three pounds and one half of a pound each loaf, but each of them was of a far less weight, to wit, of the weight of three pounds and four ounces and no more, in breach of his duty as such contractor as aforesaid, to the fraud, great damage, and prejudice of the said poor persons respectively, and to the great danger of their healths and constitutions respectively; in contempt of our said lady the Queen and her laws, and to the evil example of others, and against the peace of our said lady the Queen, her crown and dignity.

Second count same as first, except that it alleged a delivery of tickets to the out-door poor by William Christmas Nutman, another relieving officer.

Third count substantially the same, but stating the contract and duty more generally, and alleging the delivery of divers tickets by several relieving officers, not by naming them.

Fourth count same as third, but alleging that defendant supplied two loaves of short weight to one Susanna Godfrey.

Fifth count, in substance the same, but alleging a supply of loaves of short weight to Elizabeth Bowles.

Sixth count, same — alleging a supply of loaves of short weight to Samuel Lingwood.

Seventh count, same — alleging the supply to James Mayer.

Eighth count — That heretofore, to wit, on the 21st day of January, 1854, at the parish, &c., and within the jurisdiction of this court, John Eagleton unlawfully, knowingly, and designedly did falsely pretend to one William Christmas Nutman, then being relieving officer of the said parish of Great Yarmouth, that he the said John Eagleton had, on the day and year last aforesaid, supplied and delivered to one Samuel Lingwood, then being a poor person of the parish, two loaves of bread, and that each of the said two loaves then weighed three pounds and one half of a pound, by means of which said false pretence, the said John Eagleton did then and there unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the guardians of the poor of the said parish a sum of money to wit, the sum of one shilling of the moneys of the said guardians, with the intent thereby then and there to cheat and defraud. Whereas in truth and in fact the said two loaves of bread did not each weigh, nor did either of them weigh three pounds and one half of a pound; against the form of the statute in such case made and provided, &c.

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Ninth count, same as eighth, but alleging as the false pretence that he had delivered to James Mayer loaves weighing three and a half pounds each.

Tenth count, same as eighth, but alleging a false pretence made to William Harbert, that he had delivered loaves of full weight to Elizabeth Bowles.

The contract which was annexed to the case, bore date 22d December, 1853. It recited the orders of the Poor Law Commissioners for the constitution and regulation of the Board of Guardians, the advertisement by the guardians and the tender by Eagleton. It then contained the terms of agreement between the parties thus: "and the said John Eagleton doth, in consequence of the payment to be made to him as hereinafter mentioned, hereby contract with the said guardians, that he the said J. E. will henceforth until the 25th day of March next, serve, supply and deliver, or cause to be delivered to the out-door poor at such times and in such manner as the said board of guardians, &c., shall from time to time direct, such quantities of bread and flour as shall be required, &c., at and after the rates or prices following, that is to say, bread made from the best household flour in loaves of three and a half pounds each, &c., at sevenpence per loaf." Then followed the agreement by the guardians to pay "at and after the rates and prices aforesaid, during the said term, for every quantity of the said articles so to be ordered, served, supplied and delivered, and of which a bill of particulars shall be sent with the said articles at the time of the delivery thereof, within two calendar months from the said 25th day of March next."

The agreement proceeded thus:—

"Provided always, and it is hereby expressly agreed, and particularly by and on the part of the said J. E., that in case such articles shall not be duly served, &c., when and as required by the said board, &c., and when delivered shall not in every respect be of the quality and sort contracted for, or shall be deficient in the weight stated and charged for in such bill of particulars, &c., or if delivered without such bill of particulars, they the said board, &c., shall be at liberty to return the same at the expense of the said J. E., &c. And that in every such case it shall be lawful for the said board, &c., to purchase a fresh supply or employ any other person to supply the said out-door poor with bread and flour, &c. And that in such case the said J. E., his executors and administrators, shall bear and make good all costs, charges and expenses of such additional supply over and above the price at which the same are hereinbefore contracted to be supplied and delivered by the said J. E. And also that it shall be lawful for the said Board of Guardians to retain and apply any sum of money which may be due to the said J. E. under and by vir-

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tue of this agreement at the time of such failure in the performance thereof to the payment of such loss, costs, damages, and expenses as the said board may incur or be put to by reason thereof."

Then followed a stipulation that, notwithstanding the agreement last therein contained, the board should be at liberty to put in suit the bond given for the performance of the contract; and also to determine the contract at any time by five days' notice in writing.

The court, at a sitting holden on the 28th day of April, 1854, having considered that the case should be amended so as to disclose the evidence on which the jury found the verdict of guilty on the last three counts of the indictment, the learned recorder subsequently stated the same to be as set out, *ante*. The case, as amended, came on to be argued on 3d June, 1854. Before the conclusion of the arguments on behalf of the defendant, it was intimated by the court that the case was of such importance to the administration of justice, that the court had come to the conclusion that it had better be adjourned till the Michaelmas Term following, which was accordingly done.

It was stated in the course of the argument on behalf of the defendant on 3d June, 1854, that in the first edition of Chitty's Criminal Law, there was a precedent¹ of an indictment against a baker at Norwich, charging an offence similar to that disclosed by the first seven counts of the present indictment; but that in the second edition of Mr. Chitty's work, that precedent was omitted, it being stated that the facts charged had been held not to constitute an indictable offence.

It was intimated by the court that it was desirable that a report of any case in which it was so held should be found.

Search having accordingly been made, an entry was found in the Norfolk Circuit Gaol Delivery Minute Book as to an indictment at the city of Norwich, Summer Assizes, 25th July, 55 Geo. 3, against one Benjamin Harling, on which indictment a verdict of not guilty had been returned. The following is a copy of the abstract or minute of the indictment as entered in the said minute book, and was certified to be a true extract therefrom by the deputy clerk of assize of the Norfolk circuit.

"That defendant on the 29th September, 1812, contracted with the governor, &c., of the poor of Norwich to make and deliver until 29th

¹ The precedent referred to will be found in 2 Chitty, Crim. Law, 1st edit. p. 559, and in a note (g) it is said, that the indictment was settled on the decided opinion of a very experienced barrister, that the offence was indictable on the ground stated 2 East, P. C. 821, that all frauds affecting the public at large are indictable, though arising out of a particular transaction and contract.

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September following, bread of seconds flour to be delivered the day after the same was baked, each to weigh 1 lb. 15 oz., at a certain price, but contriving to cheat the poor and deprive them of a portion of their daily allowance, on 15th July, 1813, delivered to Stannard, the master and superintendent of the poor, 120 loaves not weighing 1 lb. 15 oz., but 1 lb. 11 oz.

“2d. The like, without specifying the exact weight, but that the loaves were less weight than contracted for.

“3d. Like the first, without stating with whom the contract was made, but generally that the defendant contracted to make and deliver the bread to weigh 1 lb. 15 oz., and that each loaf weighed only 1 lb. 11 oz.

“4th. That defendant, for a reasonable reward, contracted with the governor, &c., to deliver loaves weighing each 1 lb. 15 oz., and that he delivered 120 loaves of a much less weight, knowing them to be deficient.”

Search was made by the clerk of assize for the Norfolk circuit for the indictment itself, but it could not be found; nor does it appear from the above extract under what circumstances the verdict of not guilty was returned; but the learned recorder, by whom this case was reserved, furnished the following report of the case of *Rex v. Harling*, from the *Norwich Mercury* of July 29th, 1815, which newspaper he found in the British Museum.

“*The King v. Harling*. This was an indictment instituted by the court of guardians in this city against the defendant, for supplying the workhouse with bread short of weight, with intent thereby to defraud the poor in the house of a portion of their allowance. The contract into which the defendant had entered with the corporation (in consequence of a public advertisement appearing in the *Norwich Mercury*) to provide bread for the workhouse, each loaf to weigh 1 lb. and 15 oz., was proved. The mayor, who was one of the committee, was examined, and stated that he weighed one of the loaves sent by the defendant, on the 16th July, 1813, and it weighed only 1 lb. and 11 oz.; he then weighed a score of loaves, and found a deficiency of 4 lbs. in weight; after that he weighed six score, and there was a deficiency of 25½ lbs.; but an objection was taken on the part of the defendant that the offence with which he was charged was not an indictable offence as, in order to constitute such an offence, it was necessary that the public should be injured by it; and further, that it must be such as ordinary prudence could not provide against. It was also urged that sending a less quantity than was contracted for, is merely a breach of a civil contract and not an indictable offence. It was answered on the other side that it was an indictable offence, inasmuch as all the poor in the workhouse were affected by it and

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inasmuch as the contract was not made with a private individual, (a breach of which would have made only a private injury,) but with a body of persons incorporated, which made it public. The court was of opinion that according to strict law, it was not an indictable offence, but only a breach of a civil contract, and therefore that the indictment could not be supported. The jury were directed to acquit the defendant, who was very severely reprimanded by the judge."

This case appeared to have been tried before Thompson, C. B., or Sir Vicary Gibbs, C. J., but it was uncertain which.

This case was again argued on the 2d December, 1854, before JERVIS, C. J., POLLOCK, C. B., PARKE, B., MAULE, J., WIGHTMAN, J., ERLE, J., PLATT, B., MARTIN, B., and CROMPTON, J.

Bulwer appeared for the Crown, and *Clerk, J. Burchell* and *Poland* for the defendant.

Clerk, (J. Burchell and Poland with him,) for the defendant. The first seven counts are for a cheat at common law, and the three last counts for attempting to obtain money by false pretences.

PARKE, B. I suppose the seven first counts were disposed of at the first hearing.

Bulwer. Some of the judges thought those counts good.

Clerk. Probably those counts would never have appeared, had it not been that in the first edition of Chitty's Criminal Law, Vol. II., p. 559, a form of indictment is given on which those counts are founded, to which form is appended a note stating that the indictment was settled on the decided opinion of a very experienced barrister that the offence was indictable on the ground stated, 2 East, P. C. 821, that all frauds affecting the public at large are indictable, though arising out of a particular transaction and contract. But in the second edition of the same work we find that this form is omitted.

Since this case was last argued, inquiries have been made as to the authority on which this form of indictment was so omitted.

The learned counsel then referred to the extracts from the Norfolk Circuit Gaol Delivery Minute Book and from the *Norwich Mercury* newspaper, set out *ante*, which he contended showed that such an indictment was bad at common law, and disclosed only a fraud of a private nature.

One of the leading cases on this subject, and, indeed, the case

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which is said to have clearly established the true boundary between those frauds that are and those that are not indictable at common law,¹ is the case of *Rex v. Wheatly*, 2 Burr. 1125; 1 W. Bl. 273; 1 Leading Crim. Cases, 1. There the defendant, a brewer, was charged by an indictment at common law for that he, intending to deceive and defraud one Richard Webb of his money, falsely, fraudulently, and deceitfully sold and delivered to him sixteen gallons of amber for and as eighteen gallons, knowing there were only sixteen gallons. This was holden to be a civil injury only, and not an indictable offence, as it was a case of mere private imposition upon the person with whom the defendant was dealing, and he had not employed any false weight or measures, nor used any false tokens, nor conspired with any one else to cheat the prosecutor. In giving judgment, Lord Mansfield refers to a case of *Rex v. Wilders*.² The prisoner, in that case, was a brewer, and was indicted for a cheat in sending in to Mr. Hicks, an alehouse-keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. Hicks assuring him that they did contain that measure, when in fact they did not contain such measure, but much less. This indictment was quashed on argument although, as Lord Mansfield remarked, it disclosed a stronger case than *Rex v. Wheatly*.

In 2 East, P. C., a number of cases are collected, which all go to show that this is no offence at common law. *Rex v. Dunnage*, 2 Burr. 1130; *Rex v. Haynes*, 4 M. & S. 214; *Rex v. Lara*, 2 East, P. C. 819; 6 T. R. 565; *Rex v. Pinkney*, 2 East, P. C. 819; *Rex v. Bower*, Cowp. 323; *Rex v. Cornbrune*, 1 Wils. 301; *Rex v. Osborn*, 3 Burr. 1697.

Clerk was then desired by the court to direct his arguments to the last three counts; but as the whole of his arguments on the part of the defendant, as well as those of *Bulwer* on behalf of the Crown, as to those counts, were recapitulated on the subsequent hearing of the case, they are here omitted.

The argument was resumed on the 3d day of February, 1855, before JERVIS, C. J., PARKE, B., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., PLATT, B., WILLIAMS, J., and CROMPTON, J.

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¹ 2 Greaves, Russell on Crimes, 284.

² See 2 Burr. 1128. Lord Mansfield, in referring to this case, states that he was informed of it by Denison, J., and that it was M. 6 G. 1, B. R., and the learned reporter adds the following note: "I have a like account of this case. The court said that the prosecutor could not have been imposed upon without his own carelessness; and instanced the case of selling an unsound horse affirming him to be sound; and they held that such private unfair dealings which did not affect the public, were not indictable crimes unless accompanied by false tokens or conspiracy, or selling by false weights or measures."

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Bulwer proceeded with his argument on behalf of the Crown as to the last three counts, and recapitulated his former arguments as to those counts.

The main question is, whether a man representing falsely, with intent to defraud, that he has completed a contract into which he has previously entered, is guilty of an indictable false pretence. There are three classes of cases in which money may be obtained by false pretences. First, the ordinary case where there is no contract; secondly, where the false pretence induces a contract, in pursuance of which the money is paid; and, thirdly, where the contract is *bond fide* in the first instance, there is then a false pretence that it has been performed.

All three classes are, I contend, within the statute 7 & 8 Geo. 4, ch. 29, § 53, where the pretence is made with intent to defraud, and money is obtained by it; and when it has been proved that a false pretence of an existing fact has been made, it is a question for the jury whether such pretence was made with intent to defraud, and whether the money was obtained by means of the pretence.

With regard to the second class of cases they are within the statute, and the fact of the pretence inducing a contract makes no difference. This is established by the decisions in *Regina v. Kenrick*, 5 Queen's Bench Rep. 49, and *Regina v. Abbott*, 1 Denison, C. C. 173; 2 C. & K. 630, and those decisions are in accordance with the general principle, that if the false pretence creates the credit it is within the statute.

As to the third class of cases, it is included in the generality of the term "false pretences," in the statute. In *Young v. The King in error*, 3 Term Rep. 98, Lord Kenyon, C. J., says, that when the statute was passed it was considered to extend to every case where the party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit.

In *Witchell's case*, 2 East, P. C. 830, the prisoner obtained money by the false pretence, that certain workmen, whom it was his duty to pay, had earned more money than they really had, and that was held to be obtaining money by a false pretence within the statute; and this decision was on the principle, that if the false pretence creates the credit, it is within the statute. In *Rex v. Airey*, 2 East, 30; 2 East, P. C. 831, where a common carrier, having received certain goods for the purpose of carrying and delivering for hire, obtained money for the carriage of such goods by falsely pretending to have delivered them, and to have lost the bailee's receipt, he was convicted of obtaining such money by false pretences, and on error after conviction the judgment was affirmed.

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The preamble of the statute 30 Geo. 2, ch. 24, which recites that frauds had been committed by evil disposed persons "to the manifest prejudice of trade and credit," is against the limited construction which the defendant seeks to put upon the statute; and there are many cases which show that an indictable offence is not the less indictable because it is a breach of contract. In *Treeve's case*, 2 East, P. C. 821, in 1796, the prisoner was convicted on an indictment charging a common-law fraud by supplying prisoners of war with unwholesome food, not fit to be eaten by man, and the judges held the conviction right. There the objection in arrest of judgment was, that it did not appear that what was done was in breach of any contract with the public, or of any moral and civil duty, and one does not see any reason why the act done in that case would have been less an offence if it had also been a breach of contract.

In *Rex v. Friend*, Russell & Ryan, C. C. 20, it was held to be an indictable offence in the nature of a misdemeanor to refuse and neglect to provide sufficient food for an infant of tender years, unable to provide for and take care of itself, so as thereby to injure its health; such child being an apprentice whom the party is obliged by contract to provide for. In that case Chambre, J., thought it not an indictable offence, but a matter founded wholly on contract, but the rest of the court held otherwise.

The decision of Littledale, J., in *Rex v. Codrington*, 1 Car. & P. 661, is relied on for the defendant. There selling an estate, with a covenant for title where the party had previously sold his interest to another person, was held only to be a ground for a civil action. But the authority of that case is questioned, if in fact the decision is not overruled.

The learned counsel referred to *Rex v. Crossley*, 2 Moo. & Rob. 17, and *Regina v. Bates*, 3 Cox, C. C. 201.

The authority of *Rex v. Codrington*, is also questioned in *Regina v. Kenrick*, 5 Q. B. 49, in a considered judgment of the Court of Queen's Bench, in which it is said that the decision of Littledale, J., had been lately much doubted by the judges with reference to a case reserved by the Recorder of London. The case of *Regina v. Kenrick* was considered in this court in *Regina v. Abbott*, 1 Den. C. C. 273, and the decision was supported and acted upon by the twelve judges then present.¹

¹ In Archbold's Criminal Pleading, (London ed. 1856,) 390, is the following passage in the text: "But in *Regina v. Kenrick*, 5 Q. B. 49; Dav. & M. 208, that decision (*Rex v. Codrington*), was much questioned, and it was strongly intimated, that the execution of a contract between the same parties does not rescue from punishment the obtaining of money under false pretences, in conformity with the contract. And in

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In *Watts v. Porter*, 3 Ell. & Bl. 760 ; 26 Eng. Law and Eq. Rep. 116, Erle, J., speaking of a debtor charging as unincumbered that which is incumbered, says: "If he asserted expressly that it was unincumbered, and obtained the advance by that falsehood, he would be indictable for a false pretence."

As to the case of *Rex v. Reed*, 7 Car. & P. 848, which will also be relied on on the other side, Lord Denman, speaking of that case in *Hamilton v. The Queen*, says, (9 Q. B. 279,) "I am sure that *Rex v. Reed* was not before the judges. That decision is not overruled now, for it never took place."

If the money in this case had been obtained by the false pretence, an offence would have been committed within the words of the statute, within the mischief pointed at by its preamble, and within the principles laid down in the decided cases to which I have referred.

But these counts not being for obtaining money, but for attempting to obtain it, it is objected that all that the defendant did was to attempt to obtain credit in account.

The attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute or was an offence at common law. *Rex v. Roderick*, 7 Car. & P. 795 ; *Regina v. Chapman*, 1 Den. C. C. 432 ; and see 1 Greaves, Russ. on Crimes, 47. And handing in the ticket in this case was a necessary step towards obtaining the money, and the moment a necessary step towards the completion of a misdemeanor is taken a misdemeanor is committed.

MAULE, J. The doubt may arise — what is an attempt? Must it not be a proximate attempt? Does a man, *intending* to murder, *attempt* to do so if he buys a dagger and poison, but uses neither the one nor the other ; if a man intends to commit an offence at a distant place, getting into a railway train, or putting on his shoes, or shaving himself in the morning, would not be an attempt to do so?

Bulwer. The returning the ticket was not an indifferent act which may mean one thing and may mean another, and although the cases put may not be sufficiently proximate, this is. The indictment charges that when the defendant made the false pretence he intended to obtain the money, and so say the jury ; and he has not the less committed the offence of attempting to obtain because the step taken by him would not necessarily have ended in a money payment.

Regina v. Abbott, 1 Denison, C. C. 173 ; 2 C. & K. 630, it was decided unanimously by the judges, upon a case reserved, that the law was so." In a note it is added, that this question is now again *sub judice*, and that the case in which it has been raised is to be argued before the fifteen judges.

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This case is not one of cross accounts, and it is only in the event of the defendant committing a breach of contract or a fraud that any cross accounts can arise. The assumption of a cross account is not warranted by the case in which it is stated that the contractor on returning the tickets is credited in account, and "is paid at the time mentioned in the contract."

For this objection, *Rex v. Wavell*, 1 Moo. C. C. 224; *Regina v. Crosby*, 1 Cox, C. C. 10; and *Regina v. Garrett*, 1 Dearsly, C. C. 232; 6 Cox, C. C. 260, are relied upon. In *Wavell's case* you could not say what specific sum was paid on account of the false check. You could not say what checks were paid on account of the good securities and what on account of the bad; all that could be obtained by the defendant was credit in account; and Lord Tenterden observes, in the course of the argument, "he only obtains credit in account; somebody else receives the money."

In *Regina v. Crosby* the charge was for obtaining and not for attempting to obtain, and no money was in fact obtained, but only credit in account. The ground of the judgment in *Regina v. Garrett* was, that no money could have been obtained by the defendant, even if his fraud had succeeded. In this case money might have been obtained; the intention of the defendant was to obtain it; and, according to the course of dealing between the parties, if the fraud had not been discovered, he would have obtained it.

As to the first seven counts, I do not dispute that *Rex v. Wheatly*, 3 Burr. 1125; 1 Leading Crim. Cases, 1; and *Rex v. Osborn*, 3 Burr. 1697, are law; but the ground on which I proceed is, that the facts charged show a fraud which is public in its nature and indictable at common law. The poor are not a limited but an unlimited class of persons, and may include the whole kingdom, as every poor person who becomes destitute in a parish becomes entitled to relief. The 4th count charges an intent to cheat and defraud the poor, and that intent is evidenced by the defendant's particular acts. Thus, if a man sells by false scales, it is evidence of an intent to cheat every person he may deal with. *Rex v. De Berrenger*, 3 M. & S. 67; *King v. The Queen*, 7 Q. B. 795. It was a fraud upon the guardians, who represent the class of ratepayers, and a fraud upon the guardians as public officers acting under the Poor Law Commissioners.

PLATT, B. Defrauding a member of a class is not defrauding the class. Do you say the delivery of a loaf short of weight to one pauper was a fraud on the poor as a class?

Bulwer. I say it is evidence of it. The learned counsel also

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referred to *Rex v. Dixon*, 3 M. & S. 11; *Rex v. Young*, 3 Term Rep. 98; *Rex v. Brisac and Scott*, 4 East, 164; *Rex v. Haynes*, 4 M. & S. 214; *Regina v. Wickham*, 10 A. & E. 34; *Rex v. Woolley*, 1 Den. C. C. 559; *Regina v. Warren*, Russ. & Ry. 48, n.; *Rex v. Booth*, Russ. & Ry. 47, n., when it was intimated by the court that the argument as to those counts ought not to be further proceeded with.

Clerk, (*Mills* and *Poland* with him,) then replied as to the last three counts, and contended that they did not disclose any offence. There is nothing to show any liability in the relieving officer to pay for the bread supplied, or to show how the defendant by making the alleged assertion as to the weight of the loaves, could obtain money from the guardians. Secondly, there is no false representation by the defendant for the purpose of obtaining the money. Nothing is said by him as to the weight of the loaves; but having delivered the loaves to the persons presenting tickets, he afterwards returns the tickets to the relieving officer, as he was bound by his contract to do.

MAULE, J. The returning the tickets by the defendant was a representation by him that there were *in rerum naturâ* so many ounces of bread, which was not so in fact. I believe we all think that what took place amounted to a representation by the defendant to the guardians that he had delivered a certain number of loaves of a certain weight.

Clerk. Thirdly, there was no false pretence within the provisions of the 53d section of 7 & 8 Geo. 4, ch. 29. That question was not one of fact for the jury, but was entirely a question of law for the court. The statute was intended to apply to cases where the whole transaction was false and fraudulent, and not to fraudulent breaches of contract; the preamble shows that the object was to meet cases of fraud which, in their nature, would be analogous to stealing; and I think I shall be able to show that the decided cases bear out that view of the statute, and that it was never intended to apply to fraudulent breaches of contract.

In *Young v. The King in error*, 3 Term Rep. 98, the story told by the prisoner was entirely false, and he never intended to give any consideration. In *Hamilton v. The Queen in error*, 9 Q. B. Rep. 271, the entire pretence was false. So in *Rex v. Barnard*, 7 Car. & P. 781, the whole story was false, and so it was in *Regina v. Bates*, 3 Cox, C. C. 201; *Rex v. Crossley*, 2 Moo. & R. 17; and in the older case of *Rex v. Airey*, 2 East, 30.

In *Witchell's case*, 2 East, P. C. 830, the whole story as to the men who had not been employed, and as to the work which had not been done, was false.

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MAULE, J. There the defendant, being entitled to something, delivered false accounts so as to make out that he was entitled to something more. That may raise a difficulty upon you, as the judges held that case clearly within the statute.

WILLIAMS, J. Suppose a builder having contracted to build a house, obtains the price by a false pretence that he has built it, he having in fact done nothing towards it, is that within the statute?

Clerk. Yes.

WILLIAMS, J. But suppose he had completed it all but the roof, would the pretence then be within the statute?

Clerk. Perhaps I might admit that; but suppose the contract was that Memel timber should be used, and the contractor used Canadian timber, and then alleged that the house was completed according to the contract, or if he alleged that the work was done in a workmanlike manner when it was not, I should say it would not be within the statute.

There is a case decided by a judge of very great authority, *Rex v. Pywell*, 1 Stark. Rep. 402, in which Lord Ellenborough held that an indictment would not lie for a deceitful representation and warranty of the soundness of a horse;¹ it is true that the marginal note in *Regina v. Kenrick*, 5 Q. B. 49, and the observations of Lord Denman in that case are at variance with that doctrine; but the observations of Lord Denman were not necessary to the judgment which was upon the first three counts of the indictment, all of which charged a conspiracy.

Then, as to *Watts v. Porter*, 3 Ell. & Bl. 760, the dictum of Erle, J., in that case was not necessary to the judgment.

As to *Regina v. Abbott*, 1 Den. C. C. 273, and the other cases decided with it, they were not argued by counsel, and the court proceeded on *Regina v. Kenrick*; but the defendants in those cases not only warranted the cheese they sold, but put a piece of good cheese into the bad cheese, using a fraudulent device, which might be indictable at common law; but I doubt whether it is within the statute.

There is also the case of *Regina v. Ball*, Car. & Marsh. 249, in which a man represented to a pawnbroker that eleven thimbles, which he wanted to pawn, were silver; but the pawnbroker, on test-

¹ But see *Regina v. Rowlands*, 2 Den. C. C. 364; 5 Cox, C. C. 490; 17 Q. B. 671; 9 Eng. Law and Eq. Rep. 292; and 3 Greenleaf, Ev. (3d ed.) § 84, note (7), § 90 a, note (3.)

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ing them, found they were not, and did not give him any money, and it was there held that the conduct of the prisoner amounted to an attempt to commit the statutable misdemeanor of obtaining money by false pretences. The authority of this case is however questionable, and there does not seem to be any reported case which had previously decided the question. The decision is at variance with a previous case of *Regina v. Tabram*, cited Car. & Marsh. 251, and it does not appear who the judges were with whom Mr. Sergeant Mirehouse consulted before delivering judgment.

In *Rex v. Reed*, 7 Car. & P. 848, which is perhaps in its circumstances the nearest to *Regina v. Ball*, the prisoner had sold coals with a false representation of their value. That case was tried before Tindal, C. J., and the prisoner's counsel having moved in arrest of judgment, the question was reserved for the consideration of the judges; and in the ensuing term the case was considered by the judges, who held the conviction wrong.

It is true that Lord Denman is stated, in *Hamilton v. The Queen*, to have said, that *Regina v. Reed* never was considered by the judges; but, besides the report of it, (7 Car. & P. 848,) it is again referred to in a note to *Regina v. Ball*, Carr. & Mar. 253, n. (a), as having been decided by the fifteen judges.

MAULE, J. Suppose the defendant had said, I have delivered one hundred loaves, when he had in fact only delivered fifty, that might have been a false pretence; but a false representation as to the weight may be a different thing.

WIGHTMAN, J. Suppose he had said, I have delivered one hundred loaves in pursuance of and in accordance with the contract.

Clerk. If that would be a false pretence, it would equally be so if he said, I have delivered bread, made of the best household flour, when it was in fact made of flour of an inferior quality; or if he had said that the bread was baked for so many hours, when in fact it had not been baked so long.

POLLOCK, C. B. I doubt much whether any real dealing about buying and selling is within the statute. If the buying and selling are merely a pretence in order to cheat, it is a different thing.

Clerk. If in a case like this the defendant would be indictable, every breach of contract followed by a representation that the contract had been performed would be equally so. The question really is, whether a contractor does, by sending in an account charging for

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that as done according to contract which is not so done, (for returning the tickets in this case was nothing more,) make such a false pretence as renders him liable to indictment. But even if there was any false pretence at all, all the prisoner attempted to obtain by it was credit in account. The attempt to be indictable must be such as must, if successful, obtain money; and an indictment would be bad which merely alleged that the defendant, by false pretences, obtained or attempted to obtain credit in account.

The case of *Regina v. Wavell*, 1 Moody, C. C. 224, is, I apprehend, decisive of this point. The money, according to the contract, was not to be paid till a certain time had elapsed, and there might then be a balance in favor of the guardians and against the defendant; and, in fact, in this case the time for payment had not arrived when the trial of the defendant took place. The case of *Regina v. Crosby*, 1 Cox, C. C. 10, is also in point. There the prisoner having entered into an agreement to act as captain of a certain vessel belonging to the prosecutor, upon receiving two thirds of the net profit of the vessel, delivered in a bill for repairs to a larger amount than he had actually paid, and was allowed the amount in the settlement of accounts, and it was held by Maule, J., that an indictment for obtaining money by false pretences would not lie, since the prisoner did not by the false pretences obtain that amount of money, but only credit for the difference between the amount actually paid and the amount which he charged. So here no specific sum of money could have been obtained by the alleged false pretence, and all that the defendant could possibly obtain was credit in account. The decision in *Regina v. Garrett*, 1 Dearsly, C. C. 532; 6 Cox, C. C. 260, proceeds upon the same principle. It being then clear that an indictment for attempting to obtain credit in account would be bad; although the indictment in this case charges an attempt to obtain money, the evidence only proves an attempt to obtain credit in account, and the defendant was in fact convicted before the time for payment of the money arrived.

Cur. adv. vult.

The judgment of the court was delivered on the 9th day of July, 1855, by

PARKE, B. This case came originally before the Court of Criminal Appeal in the beginning of last year.

It was reserved by Mr. Palmer, the Recorder of Great Yarmouth, upon a trial before him of an indictment containing ten counts. The first seven charged the defendant, a baker, with a fraud. He is alleged to have contracted with the guardians of the poor to deliver

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for a certain term to the out-door poor of the parish of Great Yarmouth, in such manner as the guardians, or any other person authorized by them, should direct, quantities of bread made of the best household flour, in loaves, each loaf weighing three pounds and a half, to be paid for at sevenpence a loaf; and is charged with having delivered loaves to different poor people of less weight, intending to deprive them of proper food and sustenance, and to endanger their healths and constitutions, and to defraud the guardians of the poor.

The last three counts charge the defendant with a misdemeanor in attempting to obtain money from the guardians, by falsely pretending to the relieving officer that he had delivered to certain poor persons a certain number of loaves, and that each of those loaves weighed three pounds and a half.

The Court of Criminal Appeal, which sat on the 28th April, 1854, thought that the defendant could not be convicted on any of the first seven counts, as the delivering less than the quantity contracted for was a mere private fraud, no false weights or tokens having been used, and further, that it did not appear to be indictable on the ground that the defendant delivered unwholesome provision, nor was that offence charged in the indictment. But the judges then forming the court were inclined to think that the three last counts were maintainable; but, as it was contended on the part of the defendant that the evidence first stated by the learned recorder did not appear to make out the specific offence mentioned in those counts, the case was referred back to him to state the evidence more fully. This was done, and the amended report considered on the 3d June, 1854, before Lord Campbell, C. J., and Alderson, B., Coleridge, J., Martin, B., and Crowder, J. Upon the argument, the learned judges doubted of the propriety of the conviction on the last three counts, and desired the case to be argued before the fifteen judges.

Accordingly, Jervis, C. J., Pollock, C. B., Parke, B., Alderson, B., Erle, J., Platt, B., Martin, B., and Crompton, J., assembled on December 2d, 1854, and on February 3d, 1855, Jervis, C. J., Parke, B., Maule, J., Wightman, J., Cresswell, J., Platt, B., Williams, J., Crompton, J., and Martin, B.,¹ on which last day the case was fully argued by Mr. Bulwer for the prosecution, and Mr. Clerk for the prisoner.

It was contended by Mr. Clerk, for the prisoner, that the indictment for attempting to obtain money by false pretences could not be supported, because the offence of obtaining money under false

¹ It will be seen on reference to the report, *ante*, pp. 98, 99, that the statement there made of the judges present on these occasions does not agree with that in the judgment; but the reporter, on referring to the Minute Book kept by Mr. Straight, clerk of the court, finds that the entry there is the same as in the report.

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pretences was committed only when the money was obtained wholly without consideration, and the offence was analogous to larceny, of which the prisoner might by stat. 7 & 8 Geo. 4, ch. 29, § 53, be convicted, in case the offence should appear on the trial to be larceny.

There are many cases, no doubt, as is mentioned in that section, in which the distinction is very subtle between the misdemeanor of obtaining money under false pretences and larceny, and it was very proper to make that provision in the statute; but it does not follow that all the cases of obtaining money by false pretences are of that description. But it was strongly contended that the statute against obtaining money by false pretences applied to no cases where there was some bargain or consideration for giving the money, and so some cause for the giving, other than the false pretence; as where goods were sold under a false representation of the quality or value, and the purchaser had the commodity; otherwise the range of indictable offences would be greatly extended, and breaches of contract made the ground of criminal proceedings.

If this had been the case of a sale of bread to the prosecutors, with a false representation of the weight, and an attempt thereby to receive a larger price than was really due, we should have had to decide whether an indictable offence had been thereby committed, and should have had to consider the case of *The Queen v. Kenrick*, 5 Q. B. Rep. 49, which was a case of the sale of horses by means of a false representation of their being the property of a private gentleman, and quiet to ride and drive; and also that of *The Queen v. Abbott*, 1 Den. C. C. 273, decided upon the authority of *The Queen v. Kenrick*. In all these cases the prosecutor did not part with his money merely on account of the false pretences, but principally because he had a consideration for it in the property vested in him by the contract.¹

But this is not the case of a sale of goods by a false pretence of their weight; it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, namely, that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of 2*d.* as the number of loaves falsely pretended to have been furnished amount to.

In this respect the present case exactly resembles that of *The King v. Wittchell*,² where the prisoner obtained money by the false pre-

¹ See note, *ante*, p. 101.

² This case is reported in 2 East, P. C. 830, as follows:—

REX v. WITCHELL.

*Trinity Term, 1798.

A workman employed by clothiers was to keep an account of the number of shearmen employed, and the amount of their earnings and wages, which he was weekly to deliver in in

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tence that certain workmen, whom it was his duty to pay, had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done, according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been obtained.

A second objection was, that the defendant was not to obtain the price of the number of pounds falsely stated to have been delivered in cash, but only to have credit in account. The statement of the

writing to a clerk, who paid him the amount. He delivered in a false account, charging for more work and of other men than done, by which he obtained a larger sum than was due. This is obtaining money by a false pretence within the 30 Geo. 2, ch. 24; because without the false pretence he would not have obtained the credit; and is not like a case of money paid generally on account.

JOHN WITCHELL was indicted before Lawrence, Justice, on the stat. 30 Geo. 3, ch. 24, for obtaining money from A. and H. Austin, by false pretences. It appeared in evidence that the Austins were clothiers at Wootton-under-Edge; that the prisoner was a shearmen in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; that at the end of each week he was supplied with money to pay the different shearmen by the clerk of the prosecutors, who advanced to him such sum as according to a written account or note delivered to him by the prisoner was necessary to pay them. The prisoner was not authorized to draw from the clerk for money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not authorized to pay him any sums except what he carried in in his account or note as the amount of what was due to the shearmen for the work they had done. It appeared that the prisoner on the 9th September, 1796, delivered to the prosecutor's clerk a note in writing in this form — "9th September, 1796, shearmen £44 11s. 0d." which was the common form in which he made out his account of the amount of their week's wages. And it appeared further by a book in his handwriting (which it was his business to keep of the men employed, of the work they had done, and their earnings) that there were in it the names of several men who had not been employed, who were entered as having earned different sums of money, and false accounts of the work done by those who were employed; so as to make out the sum stated in the note to be due to the shearmen. The jury found the prisoner guilty; but sentence was respited in order to take the opinion of the judges whether this case were within the stat. 30 Geo. 2; the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here.

The judges first conferred on the case in Easter Term, 1798, when there was some diversity of opinion on the true construction of the statute in this respect; but finally they all agreed in Trinity Term following, on this principle, that if the false pretence created the credit the case was within the statute; and they considered that in this case the defendant would not have obtained the credit but for the false account which he had delivered in, and therefore that he was properly convicted. The defendant, as was observed by one of the judges, was not to have any sum that he thought fit on account, but only so much as was worked out.

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learned recorder is, that the defendant was to return the tickets given to the paupers by the relieving officer, and by them delivered to the defendant on receiving the loaves, and upon such return, with a written statement of the amount of loaves on the following week, would be credited in the relieving officer's book for the amount, and the money would be paid at the time stipulated in the contract; that is, on two calendar months from the 25th March following. No further step would be necessary for the defendant to receive payment. The defendant did obtain credit in account from the relieving officer in effect for the amount of the number of pounds falsely represented to have been delivered. Further, the contract with the board of guardians stipulates, that if the defendant should fail in his performance of it, the board of guardians might deduct the damages and costs sustained thereby from the sum payable to him for loaves supplied. On the part of the defendant, his learned counsel contended, first, that the attempt to obtain credit in account for a sum of money by delivering up the tickets as vouchers was not in itself an attempt to obtain money within the meaning of the statute, for that credit in account was not equivalent to money; and no doubt the credit in the relieving officer's book was not equivalent to money, and the defendant could not have been convicted of the offence of actually obtaining money by false pretences.

Secondly, he contended that the credit in account would not necessarily lead to an ultimate payment, for there might be deductions for breaches of contract, which would prevent any payments in cash by the guardians.

We have had great doubt on this part of the case, but do not think that this objection should prevail. We think that the contingency of the whole sum due to him, being subject to deductions in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an attempt to do so? The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account, or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate

Indictment—Aider by Verdict—Reference from one Count to another.

to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt. The receipt of the money appears to have been prevented by a discovery of the fraud by the relieving officer; and it is very much the same case, as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the defendant had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused.

Conviction on the last three counts affirmed.

In *Regina v. Roberts*, 1 Dearsly, C. C. 539; 7 Cox, C. C. 39; 19 Jurist, 1094; 33 Eng. Law and Eq. Rep. 553; (November 24, 1855,) it was held, that the *making and procuring* dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them there, but by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanor at common

law. In this case, Parke, B., said: "Between acts which are and acts which are not indictable, as being coupled with a criminal intent, the line of distinction cannot be exactly defined, though it is easy to tell whether a given case lies on one side of the line or the other. I quite agree with the law laid down in *Regina v. Eagleton*, that an attempt to commit a misdemeanor is not an indictable attempt, unless it is an act directly approximating to the commission of an offence." H.

REGINA v. WAVERTON.¹

November 21, 1851.

Indictment—Aider by Verdict—Reference from one Count to another.

After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count.

Any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count which merely introduced it by reference as the same subject "before mentioned."

THIS was an indictment for a nuisance in not repairing a highway, found at the Cumberland Summer Assizes, A. D. 1850. It was

¹ Court of Queen's Bench. 2 Denison, C. C. 339; 17 Queen's Bench Rep. 562; 5 Cox, C. C. 400; 8 Eng. Law and Eq. Rep. 300.

Indictment—Aider by Verdict—Reference from one Count to another.

removed by *certiorari* into the Queen's Bench, and was tried at the Summer Assizes for the county of Cumberland, held at Carlisle, before Mr. Justice WILLIAMS, on the 5th of August, A. D. 1851. The indictment contained three counts:—

1st Count. The jurors for our lady the Queen upon their oath present, that before the day of the taking of this inquisition, to wit on the first day of January, in the thirteenth year of the reign of her present Majesty, and long before there was, and from thence hitherto hath been and still is, a certain common Queen's highway in the said county used for all the subjects of our said lady the Queen to go, return, pass, repass, ride and labor on foot and on horseback, and with cattle, carts and carriages, at their will and pleasure, and that a certain part of the said last-mentioned common Queen's highway, situate, lying and being in the township or district of Waverton, otherwise called Waverton High and Low, in the parish of Wigton, in the county aforesaid, called the Yevens Highway, leading from and out of the highway from the village of Waverton towards the town of Mary-port in the county aforesaid, at or near a place called Parkside, on the last-mentioned highway, and extending from thence towards and unto the highway leading from Lesson Hall towards the town of Ireby in the county aforesaid, at or near Waterside in the township or district of Waverton aforesaid, and containing in length 1350 yards or thereabouts, and in breadth four yards or thereabouts, on the day and year aforesaid, and from thence continually hitherto until the day of the taking of this inquisition at the parish and in the township or district last aforesaid, in the county aforesaid, was and is yet very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said lady the Queen, during the time last aforesaid, could not go, return, pass, repass, ride, and labor with their horses, cattle, carts, and other carriages, in, through, and along the Queen's common highway aforesaid, as they ought and were wont and were accustomed to do, without great danger of their lives and the loss of their goods, to the great damage and common nuisance of all her Majesty's liege subjects, going, returning, passing, repassing, riding, laboring, in, through, and along the Queen's common highway aforesaid.

And that the inhabitants of the said township or district of Waverton, in the said parish of Wigton, in the county aforesaid, have from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, that part of the highway aforesaid, so as aforesaid being

Indictment — Aider by Verdict — Reference from one Count to another.

ruinous, miry, broken, and in decay, when so often as there should be occasion.

And that the said inhabitants of the said township aforesaid have not yet done the same, to the evil example of all others in like case offending, and against the peace of our lady the Queen, her crown and dignity.

2d Count. That within the parish of Wigton aforesaid, in the county aforesaid, from time whereof the memory of man is not to the contrary, there have been and still are divers townships or districts whereof the township or district of Waverton, otherwise called Waverton High and Low, during all the time last aforesaid hath been and still is one, and that the inhabitants of the said township or district of Waverton, in the parish aforesaid, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways situate and being within the township or district of Waverton aforesaid as would otherwise be repairable and amendable by the inhabitants of the said parish at large, and that the said part of the same common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which but for the said prescription or usage would be repairable and amendable by the inhabitants of the said parish of Wigton at large. And that by reason of the premises, the inhabitants of the township or district of Waverton aforesaid, in the parish aforesaid, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend, the same part of the said common highway so being ruinous, deep, miry, broken, and in decay as aforesaid, when and so often as it hath been and shall be necessary, and that the said inhabitants of the said township aforesaid have not yet done the same, to the evil example of all others in like case offending, and against the peace of our said lady the Queen, her crown and dignity.

3d Count. The same as the second; with the exception that it averred that the inhabitants of the several and respective townships, whereof Waverton was one, situate in the parish of Wigton, were liable to repair the said highway.

Plea. Not guilty.

The jury having found the defendants not guilty on the first count, and guilty on the second and third counts, a rule nisi was obtained in the Queen's Bench on the 4th of November, to arrest the judgment on the second and third counts, on the ground that these counts were

Indictment—Aider by Verdict—Reference from one Count to another.

bad, in not containing any sufficient allegation that the highway, the subject of the indictment, was situated within the township or district of Waverton, or that the road was out of repair.

On the 13th November, A. D. 1851, this case was argued before Lord CAMPBELL, C. J., PATTESON, J., COLERIDGE, J., and WIGHTMAN, J.

S. Temple and *Pickering*, for the Crown. *Knowles*, Q. C., *Ather-ton*, Q. C., and *Unthank*, for the defendants.

Temple. After verdict, the second and third counts are sufficient, even if the court should hold that the first count cannot be referred to. The second count says, "that the said part of the same common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which, but for the said prescription or usage, would be repairable or amendable by the inhabitants of the said parish of Wigton at large." That, after verdict, is equivalent to a direct averment that the highway was ruinous and out of repair. *Posterne v. Hanson*, 2 Wms. Saund. 60 c, and 61 m, note 9, 5th ed.; *Rex v. Somerton*, 7 B. & C. 463; *Rex v. Boyall*, 2 Burr. 832. By the Statute of Jeofails, after verdict the second and third counts are sufficient. 1 Wms. Saund. 228. Secondly; the first count contains express averments that the highway was ruinous, and although the jury have found a verdict for the defendants on the first count, yet it may be referred to for the purposes of description.

PATTESON, J. Is not each count a separate indictment?

Temple. Not for all purposes. Reference may be made in one count to a preceding one. *Regina v. Craddock*, 2 Denison, C. C. 21. If the first count may be referred to, then the objections to the second and third count are cured; the words being, the said part of the same highway being ruinous and in decay "as aforesaid." But these words may be rejected as surplusage, if the first count cannot be referred to. The defendants have been found guilty of not repairing the highway when necessary; it is impossible that the jury could have found that verdict without being satisfied that the road needed repair, and without evidence that the road was situate in the township of the defendants. In the case *Regina v. Waters*, 1 Denison, C. C. 356, *ante*, p. 69, a defective statement of an act of misfeasance was held to be supported by the verdict.

Knowles, Q. C., for the Crown.

Indictment — Aider by Verdict — Reference from one Count to another.

Every count of an indictment should charge the offence with certainty. Lord Mansfield, 1 T. R. 63, said: "It is necessary in every crime that the indictment charge it with certainty and precision, alleging all the requisites which constitute the offence."

Lord CAMPBELL, C. J. Lord Mansfield was not there speaking of an indictment after verdict.

Knowles. There is no statement in the second or third count that the road is out of repair. All that is said is, that this is the part of the highway which has before been described as ruinous. The words "so being ruinous" are merely equivalent to saying "so stated to be ruinous." Although reference may be made in one count to another for some purposes, a substantial part of a charge cannot be made out by reference to a preceding count. In *Regina v. Waters*, 1 Denison, C. C. 356, *ante*, p. 69, the words "the said infant female child" were held not to import from a preceding count a description of the child as being of tender age.

COLERIDGE, J. But here the words of reference are, "so being ruinous as aforesaid."

Knowles. These words only point out the portion of the road to which the prosecutor refers. It is necessary that there should be an averment that the road was out of repair at the time that the indictment was found by the grand jury. *Poynt's case*, Cro. Jac. 214; *Johnson's case*, Cro. Jac. 609; *Rex v. Hazell*, 13 East, 139; *Regina v. Martin*, 9 Car. & P. 215. Again, there is no allegation that the road is situate in the township of Waverton. *Rex v. Upton-upon-Severn*, 6 Car. & P. 133.

Lord CAMPBELL, C. J. It is averred affirmatively to be so in the first count, and that averment is referred to in the second count.

Knowles. So large a reference cannot be made from one count to another.

Cur. adv. vult.

On the 21st November, the judgment of the court was delivered by Lord CAMPBELL, C. J.

The second and third counts of the indictment in this case are drawn very inartificially; but we think that after verdict they may be supported. The allegation to which our attention was directed, when the motion was first made for arresting the judgment, certainly

Indictment — Aider by Verdict — Reference from one Count to another.

does not sufficiently charge that the road was out of repair, namely, "that the said part of the same common highway hereinbefore mentioned, to be ruinous, &c., as aforesaid, was a common highway," &c. This is only a description of the highway and not an allegation that it was actually out of repair. But there follows an allegation, that the inhabitants of the township "ought to repair and amend the same part of the said common highway, so being ruinous, &c., as aforesaid, when and so often as it hath been and shall be necessary, and that the said inhabitants of the said township, have not yet done the same." Here we have a clear and specific reference to the first count, which contains a formal allegation, that this part of the highway was out of repair. There are many authorities to show that one count of an indictment may refer to another, and that under such circumstances the maxim applies, *Verba relata inesse videntur*.

The objection that the second and third counts do not show the part of the highway out of repair to be in the township, admits of a similar answer. The first count alleges, "that a certain part of the said highway situate, lying and being in the township of Waverton, &c.," (describing it, and stating its length and width,) "was, and yet is ruinous," &c.; and the second and third counts allege, "that the said part of the same common highway hereinbefore mentioned, to be ruinous," &c., was a highway, which the inhabitants were bound to repair. It has been determined that any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject "before mentioned." But the local situation of the part of the highway described, must necessarily and invariably belong to it, and if once described as being in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation, that it is within the township, seems not to be strictly necessary. We must very much regret the negligence in framing indictments, which causes such discussions; but, we are glad that in this case it has not led to a failure of justice. The rule for arresting the judgment must be discharged.

Indictment — Receiving Stolen Goods.

REGINA v. CASPAR.¹

March, 1840.

Indictment — Receiving Stolen Goods.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously received the said goods, knowing, etc., is bad as against A. B., but good against the receivers as for a substantive felony.

THE prisoners were tried before Mr. Justice LITTLEDALE, at the Old Bailey Sessions, in June, 1839.

The following is an abstract of the indictment : —

First count alleged that a certain evil-disposed person stole, on 25th of March, at St. George, in Middlesex, 102 pounds' weight of gold dust, value £5,000; 2 wooden boxes, value 2s.; and 2 tin boxes, value 2s.; the goods of James Hartley and others.

Second count charged Lewin Caspar with feloniously inciting, &c., said evil-disposed person to commit said felony on 10th of March.

• Third count, Ellis Caspar, like offence.

Fourth count, Emanuel Moses, feloniously receiving, on 30th of March, the said 102 pounds' weight of gold dust, value £5,000, knowing, &c.

Fifth count, Isaac Isaacs, alias Davis, feloniously receiving all the goods mentioned in the first count, knowing, &c., on 30th March.

Sixth count, Alice Abrahams, feloniously receiving, as in the fifth count.

Seven other counts, stating the property to be of George Hathorne and others.

Fourteen other counts, stating the property to be gold instead of gold dust.

Isaac Isaacs, alias Davis, mentioned in the indictment, was not in custody, and was not tried.

It struck the learned judge, on looking over the abstract, that it was incorrect in calling the statement of the offences committed by the several prisoners so many counts; and he then thought that what were called the seven first counts were only one count against a principal and several accessories, assuming that receivers may be considered accessories in the strict legal sense of the word.

¹ 2 Moody, C. C. 101. This case is also well reported in 9 Carrington & Payne, 289.

Indictment — Receiving Stolen Goods.

After Mr. *Clarkson* had opened the case for the prosecution, *Bompas*, Sergeant, who was counsel for Moses, one of the prisoners, said that Mr. *Clarkson* ought to elect which of the prisoners he would proceed against; but Mr. *Clarkson* said it was not a case in which he was bound to elect, and the question was not then much discussed; but in the view the learned judge then took of the indictment, that it was a case of principal and accessories, he thought the prosecutor was not bound to elect. If he had thought otherwise of the indictment, he would have directed him to elect.

The case then proceeded, and a person called Henry Moss was produced, and examined on the part of the prosecution as the evil-disposed person mentioned in the indictment, who stole the gold dust. He was not a person unknown either to the grand jury or the prosecutors, for his name was on the back of the indictment as a witness. And there was another indictment found by the grand jury, in which Henry Moss, by name, was charged as the person who stole the gold dust, and which last-mentioned indictment was, except as to Henry Moss being named instead of saying an evil-disposed person, exactly the same as the present indictment, under which the trial took place.

The prisoners were not tried upon that other indictment, and it then remained undisposed of.

Though Henry Moss was produced and examined on the part of the prosecution as the person who stole the gold dust, it was a question for the jury, upon the whole of the evidence, whether Henry Moss was the person who stole it, or whether it was Lewin Caspar who did so.

When the evidence for the prosecution was closed, *Bompas*, Sergeant, and the other counsel for Moses, contended that there was no case to go to the jury as to Moses, and the counsel for the other prisoners contended the same as to the other prisoners.

They urged that there were two ways of framing an indictment against an accessory; either by indicting the principal with the accessory, or, if the accessory be indicted alone, you must either show that the principal had been convicted, and that can only be shown by proving the record of the conviction, or else by showing that the principal had been outlawed.

That Moses was charged as an accessory after the fact, by receiving the stolen goods, by the fourth part of the first count; and that, as the prosecutor had not proved that the principal had been convicted, the accessory was entitled to an acquittal; that the accessory cannot be convicted till the principal be convicted or outlawed; and if the principal be attainted, and the attainder be reversed, the accessory escapes; and the same doctrine applies to cases where the principal and accessory are tried together.

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If the principal pleads not guilty, and the accessory does so also, then the trial of both shall go on; and the jury are to inquire, first, of the guilt of the principal, and, if they find him guilty, then they are to inquire as to the accessory; but, if both are found guilty, the judgment must be first given of the principal, for if any thing obstruct judgment—as clergy or pardon, &c.,—the accessory is to be discharged; and if the principal does not plead not guilty, but pleads a plea in bar, or in abatement, or *autrefois acquit*, the accessory shall not be put to answer till that plea be determined. Where the guilt of the principal is averred, it can only be proved by the principal being tried with the accessory; or if he be not, then by the record of conviction or outlawry of the principal.

That was the rule of the common law; and though receivers were not, at common law, accessories after the fact, merely as receivers, yet they become so by 3 & 4 Wm. 3, ch. 9, § 4; and that the statute 7 & 8 Geo. 4, ch. 29, § 54, confirms the old law as far as relates to accessories, though it also gives another mode of proceeding, that is, for a substantive felony; but here the indictment is not framed against the receivers as for a substantive felony under the statute, but it is in the form of an indictment against the principal and accessory, and must be governed by the rules of the common law.

They also urged that the indictment, as far as related to the description of the principal, was bad, because it ought to have been in such a form as that the principal could have been legally convicted. It may refer to any person. There is no principal felon properly charged; no process could issue upon it, to bring in any principal to be tried, nor could any principal surrender himself upon such an indictment to take his trial. It should be so framed, in order to make it good as against the accessories, as that the principal could be tried and convicted with him, or that they could have put in the conviction of the principal. The indictment is too uncertain to make it good either against the principal or accessories. They contended that the principal ought to be named.

If it had said that the goods were stolen by a certain person to the jurors unknown, that would not be supported if he was known. It should show who stole the goods; for otherwise the accessories do not know what is the felony against which they are to defend themselves.

Suppose there were two indictments against a prisoner for the same offence, and there was an acquittal on the first, how could he plead *autrefois acquit* on an indictment so uncertainly framed? What evidence could he give as to who was the evil-disposed person mentioned in the first indictment? The evil-disposed person might be John Thomas or William Smith, or any body else; and if it be an

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indictment to which you cannot apply *autrefois acquit* or *autrefois convict*, it is a bad indictment. There being two indictments in respect of this transaction, is a practical illustration of the extreme difficulty in which a prisoner is placed.

They said the last objections were rather on the record.

The learned judge remarked here, that suppose the objection, that the record of the conviction was not put in, be a valid one, that, perhaps, may be thought rather to be on the record, because it would be impossible to put in a record of conviction of a certain evil-disposed person; and then, if it ought to be proved by a record, the indictment would be bad for being drawn in such a way as that the proper evidence could not be given.

The counsel for Moses admitted, that if the indictment had been for a substantive felony, under the statute 7 & 8 Geo. 4, ch. 29, § 54, merely for receiving the goods knowing them to be stolen, it would not be necessary to state who stole the goods. But that this indictment was not framed under the statute; it is an indictment against principal and accessory, and not for a substantive felony. That a substantive felony was a single felony against one or more individuals; whereas here there were five separate felonies, one of the prisoners being charged as accessory both before and after the fact. If it was a substantive felony, the prosecutor ought to elect against which of the prisoners, and for which felony, he would proceed. That if it was a substantive felony, and not to be treated as an indictment against principal and accessory, a great deal of evidence had been given against the prisoners Moses and Abrahams, which would not have been admissible if they had been separately tried for a substantive felony.

The counsel for the two Caspars, in addition to the objections made as to the receiving, contended, that whatever might be the rule as to the necessity of naming the principal felon in the case of receivers, it was essentially necessary that he should be named in the case of accessories before the fact, for otherwise it would be quite impossible for them to know against what felony they were to defend themselves; and that even in the case of a substantive felony, either against one person for a felony, or more than one person for a joint felony, the principal ought to be named.

The counsel for the prisoners then again urged, that whatever the prosecutor was bound to do, as to electing against which of the prisoners he would proceed before the evidence was gone into, he was, at all events when it was closed, bound to elect as to which of the prisoners singly the case should be submitted to the jury.

The counsel for the prosecution contended that all the objections were upon the record.

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They admitted that there was no instance of such an indictment having ever been used before; but that the circumstances of the case were of a novel description, and it became necessary to adopt a novel form of indictment to meet them.

They said, this is not an indictment against principal and accessories, but it is for a substantive felony, and is inquirable into, as to accessories before the fact, under 7 Geo. 4, ch. 64, § 9; and as to receivers under 7 & 8 Geo. 4, ch. 29, § 54; and it is one entire transaction, though the parts are done at different times.

It is composed of the stealing by Moss, of the inciting by the two Caspars, and of the receiving by Moses and his daughter Abrahams, and by Ellis Caspar; and the whole relates to the stealing and disposing of the property.

That there has been no decision as to what is meant by a substantive felony; but there is no authority to show that this is not a substantive felony. And there is no necessity to mention the name of the principal; though if it had alleged that it was stolen by a person unknown, it could not be supported if he was known.

That there was no necessity to prove any record of conviction; that it was not alleged; nor could any record of conviction of an evil-disposed person be made up. That it was sufficient to prove, by parol evidence, who stole the gold dust; and the jury may decide upon his guilt just the same as if he had been put upon his trial with the accessories; and that, as to the difficulty alleged as to the pleading *autrefois acquit* or *autrefois convict*, there would be no difficulty in supporting such a plea by proper averments.

That there are many instances of separate felonies included in the same indictment, and being tried as substantive felonies. That the proper interpretation of the words, substantive felony, is, that it has reference only to the transaction itself, merely for the purpose of stating the offences themselves which are to be the subject of inquiry, *i. e.*, the whole transaction, or *corpus delicti*; and that, under the meaning of the expression, substantive felony, you may have an indictment without naming the principal.

That it was not a case where the prosecutor was bound, either before the evidence was gone into or after it was closed, to elect which of the prisoners, singly, he would proceed against, as it was all one transaction. That if the prisoners meant to say that there ought to have been a previous conviction of the principal, they should have objected to being put upon their trial before the principal was convicted.

The learned judge thought after the evidence was closed, as he had done before it was gone into, that upon an indictment like the present, the prosecutor was not bound to elect as to which of the prisoners, singly, the case should be submitted to the jury.

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The form of the indictment was new to the learned judge, and indeed the counsel for the prosecution admitted it to be new.

The jury found all the prisoners guilty of the respective offences with which they were charged.

The counsel for the prisoners were considered as having moved all the objections which arose on the record in arrest of judgment.

The learned judge respited the judgment, that the opinion of the judges might be taken upon all the objections.

The learned judge also observed, that in 1 Hale's Pleas of the Crown, 623, it is said, the accessory shall not be constrained to answer to his indictment till the principal be tried; but if he will waive that benefit, and put himself upon his trial before the principal be tried, he may, and his acquittal or conviction upon such trial is good; but it seems necessary, in such case, to respite judgment till the principal be convicted and attain, and then the book goes on to give the reasons for it.

If that now be the law, and if this indictment be one against principal and accessory, a question will arise, supposing none of the before-mentioned objections to be tenable, and that the indictment be a good and valid indictment, yet whether any judgment can now be given upon it, and whether it must not be respited till the principal be convicted. But then no principal could be convicted upon this indictment, for the principal is an evil-disposed person, and no person by name could be tried upon it and found guilty by a jury, nor could any person by name plead guilty to it, so that any judicial notice could be taken of it.

The authorities applicable to these various points are, 3 & 4 Wm. 3, ch. 9, § 4; 1 Anne, stat. 2, ch. 9, §§ 1, 2; 5 Anne, ch. 31, §§ 5, 6; 7 Geo. 4, ch. 64, §§ 9, 11; 7 & 8 Geo. 4, ch. 29, §§ 54, 56; 1 Hale, P. C. ch. 56, p. 618; ch. 57, p. 623; 2 Hale, P. C. ch. 24, pp. 168, 174; ch. 28, pp. 216, 222, 223, 224; Hawkins, P. C. b. 2, ch. 29, in several sections; Foster, Crown Law, 343, and ch. 2; as to accessories in felony, p. 360, and following pages; 2 East, P. C. ch. 16, § 140, and following sections; p. 740, and following pages; *Thomas's case*, 2 East, P. C. ch. 16, § 164, p. 781; 2 Russell, Crim. Law, ch. 27, p. 252, and following pages, and the cases in the notes to pp. 257, 258; Starkie, Crim. Pl. 130, 156, 157, 307, and following pages; *Tilley's case*, 1 Leach, C. C. (4th ed.) 662; 1 Russell, Crim. Law, 385, 390.

This case was argued at a meeting of all the judges, except ALDERSON, B., and ERSKINE, J., in Michaelmas Term, 1839.

Bompas, Sergeant. There are two propositions to be established. First, that this is an indictment against principal and accessories, or,

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at all events, against accessories. Secondly, that unless the principal be convicted the accessories cannot. The learned judge so declared his opinion at the trial, in refusing to put the prosecutor to elect; that the indictment was in the nature of one against accessories, and it is obvious that that question is in many respects highly important beyond what respects the question of election. The whole proceeding would be materially varied, many things would be admitted in evidence against persons tried as accessories that would not be so in a trial for a substantive felony. As in the case of declarations, if there be, in fact, separate acts of receipt, and all the receivers are indicted together with the principal, his declarations would be necessarily receivable as against the principal, and so affect the rest, and the declarations of each receiver would be received as against himself.

Here two are, in fact, indicted as accessories before the fact; others as accessories after.

The statute 7 Geo. 4, ch. 74, § 9, for the more effectual prosecution of accessories before the fact, makes them indictable either with the principal felon or for a substantive felony. The different modes of indictment are clearly distinguished. In fact, the indictment, on the face of it, is clearly framed as one against accessories, and it was clearly so treated at the trial. Supposing the other indictment, in which Henry Moss is named, were before the court, he would, of course, be put on his trial as principal; and the only difference in substituting "a certain evil-disposed person" for the name there, cannot change the nature of the indictment. Indictments against receivers, as accessories in general, pursue this form with the name of the principal. If this be an indictment against accessories at common law, the principal must be convicted before the accessory can. Lord *Sanchar's case*, 9 Co. 119; 1 Hale, P. C. 623. Even if a prisoner should be taken to waive the trial of the principal by pleading to the indictment, no judgment can be passed against him, even if convicted.

In 1 Hale, P. C. 623, it is laid down, "If the accessory be indicted either alone or together with the principal, the process of outlawry shall not go against the accessory till the principal be admitted or outlawed; neither shall he be put to plead till the principal appear, but shall be bailed till the principal appear."

"The accessory shall not be constrained to answer to his indictment till the principal be tried. 9 E. 4, 48, a. But if he will waive that benefit, and put himself upon his trial before the principal be tried, he may, and his acquittal or conviction upon such trial is good. Staunf. P. C. lib. 1, c. 40, f. 46, b."

"But it seems necessary, in such case, to respite judgment till the principal be convicted and attaint; for if the principal be after ac-

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quitted, that conviction of the accessory is annulled, and no judgment ought to be given against him; but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 8 H. 5, 6, b.; Coron. 463."

The prisoner does not waive his right by pleading; in fact, the prisoner never does exercise any discretion in pleading; he does so as matter of course, to which he is compelled, in general.

[LORD ABINGER. The question is, whether the indictment is good according to the modern statutes.]

The offence of accessory before the fact was one at common law; this of accessory after, by receiving only, was created by statute. The history of the law on the subject is traced in 1 East, P. C. 743. The first statute that makes receivers of stolen goods accessories after the fact, is 3 W. & M. ch. 9, § 4; then comes the 5 Anne, ch. 31, § 5. By both of these statutes, the offence of accessory is made complete by the fact of receiving, but by the latter the party might be tried for a misdemeanor; but still he might have been indicted as accessory, and was subject to the same liability and entitled to the same privileges as accessories generally. After the statute of Anne, there were two distinct accessions to the felony and the misdemeanor. Then the statute of 7 & 8 Geo. 4, ch. 29, § 54, enacts, "that every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not have been amenable to justice," &c. Now, inasmuch as the principal here has not been convicted, this indictment must be taken to apply to the latter case of a substantive felony; and it includes a great many different persons, who could not be joined for different substantive felonies. On that ground, the learned judge states he would have stopped the case. Several receipts perfectly distinct were given in evidence on that principle, and all the declarations by this joinder became admissible, and were admitted. The judge ought to have put the prosecutor to his election; and if so, they are improperly tried, and being improperly tried, they were convicted improperly. If they were indicted as accessories under the statute, still the principal must be convicted as at common law. The meaning of a substantive felony must be, that each case stands by itself, not requiring the connection with the principal felon that is necessary in the case of accessories. If taken altogether as accessories with the principal felon, that is the connecting link; but three persons, for several distinct offences, cannot be joined. But here more is done, inasmuch as accessories before the fact are joined with accessories after, that is, accessories before the fact to the prin-

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principal felon, not to the receivers; and as between them there is no connection whatever, and the prosecutor has chosen this course, both being open.

[LORD ABINGER. Supposing it a mistrial, by election being refused, what must be the result?

LITTLEDALE, J. I certainly should have compelled election, if I had not considered it as a case of principal and accessory.]

But the indictment is bad, as to Lewin Caspar, altogether. He is only indicted as accessory before the fact, and that to a person not named. In the case of receiving stolen goods, the offence may be identified by the goods; in the case of an accessory, the identification must be made out by the person to whom is the accession. He must be named and shown to the jurors in the indictment. If unknown, that excuse must be shown in the indictment. This is so, notwithstanding the 7 Geo. 4, ch. 64, § 9, the inciting being necessarily connected with the person incited; and that not being supplied in the case of accessory before, as it can in the case of accessory after, by receiving stolen goods, the whole of which offence may be distinctly proved without any necessary identification of the person of the thief. In all cases, it is a rule that the person be named, or an excuse given for the omission. In *Rex v. Fuller*, 1 B. & P. 180, it was debated whether the mode of incitement to mutiny, &c., ought not to be shown. That shows the nicety requisite in this particular species of offence.

[LORD ABINGER. A case occurred before me of the murder of a child, the name not stated, in Essex, and the judges held the indictment bad. *Regina v. Biss*, 2 Moody, C. C. 93; 8 C. & P. 773.]

There is no instance of an indictment for an injury to the person where such vagueness is admitted. When the offence relates to an individual, you are obliged to give all the identification, or state the excuse.

LORD DENMAN, C. J. Otherwise the prosecutor may select out of a class of persons stated, and the prisoner be totally unprepared as to the individual selected.

Clarkson, for the prosecution. The case, as stated by the learned judge, brings forward all the objections. They resolve themselves, as argued to-day, into three: 1. That this is an indictment against principal and accessory, and it does not show that the principal has been convicted or outlawed. 2. That we ought to have been compelled to elect against whom we would proceed. 3. That the indictment is bad as to the accessories before the fact, inasmuch as the principal is not named.

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At the trial, no objection was made to being tried on the ground of the principal not being forthcoming; that was perfectly well known, and it is now too late to take the objection. It ought to have been taken before going to the jury, if this be an indictment against principal and accessory. 1 Hale, P. C. 623.

[LORD DENMAN, C. J. Does not that assume that there is a proper statement of a principal?]

There are authorities to show that accessorial charges are good without name. In *Rex v. Wheeler*, 7 C. & P. 170, an indictment charging a receiving from a certain evil-disposed person unknown, knowing the goods to have been stolen by said evil-disposed person, was held good; and in *Rex v. Jervis*, 6 C. & P. 156,¹ a similar indictment was sustained. And Tindal, C. J., there goes into the principle of the law, that the offence consists in receiving goods, knowing them to have been stolen, and not necessarily knowing the particular person. The rule as to joinder of offences has the exception of principal and accessories; from this, necessarily, the accessories are frequently joined, though not connected, in the same act as accessories.

[PATTESON, J. The name of the principal felon need not be stated

¹ This case is reported in 6 Carrington & Payne, 156, as follows:—

·REX v. JERVIS.

1833.

Before LORD CHIEF JUSTICE TINDAL.

In an indictment for the substantive felony of receiving stolen goods, an allegation, that the goods were stolen "by a certain evil-disposed person," is good, without stating the name of the principal felon, or averring that he is unknown.

INDICTMENT for receiving stolen goods, knowing them to have been stolen.

The first count charged the prisoner with having received the goods, knowing them to have been stolen by one Joseph Rudge. The second count charged the goods to have been stolen by "a certain evil-disposed person."

Lee, for the prisoner. I submit that the second count is bad. It ought either to have stated the name of the principal, or else to have stated that he was unknown.

TINDAL, C. J. It will do. The offence created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, will be, whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute makes the receiving of goods, knowing them to have been stolen, the offence.

Verdict — Guilty.

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when the case of receiving is treated as a substantive felony. Is there any case of that sort, where the charge is against an accessory of any other kind ?]

My answer is, that it is too late to take the objection now ; they have no right to take the chance of a trial, and then turn round with this objection. If the objection had been taken, the trial might have proceeded on the indictment against Moss ; and it is the more important now, as the proviso in § 54, of 7 & 8 Geo. 4, ch. 29, makes it exceedingly doubtful whether Moss could now be tried at all.

But this is, in substance, an indictment for a substantive felony. The common forms against receivers are in the nature of accessorial charges, but the substance is the same. Here only one transaction is stated, one entire history gone into ; this indictment does not state distinct transactions.

[LITLEDALE, J. I treated them all as one count.]

The object of the statute is to facilitate convictions against receivers ; the object is to reach them as accessories, though in a different form — to reach the accessories, when the principal is not forthcoming. It is the constant practice to join several receivers in the same indictment, when the acts of receipt are distinct ; the only difference is to charge them in different counts, as separate receivers, when the receivings are separate, and to join them in one count when the receiving is joint. The effect of the declarations of different prisoners being received is only accidental ; and the judge, of course, takes care to point out the distinct applications of the evidence. Here there is no principal charged against whom any process may go. It therefore can only be a substantive felony. We always contended it had a substantive character, though, from the nature of the transaction, there must be something accessorial about it. The old form of indictment at the Old Bailey sometimes charged stealing from a person unknown. In one case at the Old Bailey, of *Rex v. Smith*, a prisoner was convicted, without objection, of inciting a girl, unknown, to steal, &c.

[PARKE, B. May not the indictment be now good, as using the words of the statute ?]

In fact, there is no hardship upon the prisoners, as only one transaction is talked of ; and the indictment may be good as to the accessories after the fact, and bad as to those before.

Bompas, Sergeant, in reply. The objection was taken in the proper time. The practice and object of putting a prosecutor to his election is to prevent injustice, and it would be gross injustice if an ignorant person were to be bound as by a waiver by pleading. It would be carrying the provisions of 7 Geo. 4, ch. 64, §§ 20, 21, too

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far, to say, that it would be enough to pursue the words of the statute without any particulars whatever, otherwise it would do to charge a prisoner with inciting a person to commit a felony, not naming either the person or the felony. In all cases of accessories, the transaction is the same as to the principal; then they are all accessory to the same felony. The cases cited are not cases of conversion of counts relating to accessories into counts for substantive felonies, but the choice of two different counts.

MAULE, B. Can the first statement, that an evil-disposed person stole, be considered as an indictment at all against any body?

LORD ABINGER. Is it any thing more than stating first what is usually stated last, in indictments against receivers?

The judges adjourned the consideration of this case, and in the following Term, (March Session, 1840,) they determined that the statement, that an evil-disposed person stole, was too uncertain to support the charge against Lewin Caspar as accessory before the fact; but that the other prisoners were sufficiently charged with a substantive felony in receiving, and properly convicted.

The general rule of law undoubtedly is, that an indictment for a *substantive felony*, charging the defendant with feloniously receiving stolen goods, need not set forth the name of any person from whom they were received, nor that they were received from some person or persons unknown. *Rez v. Jervis*, 6 Carrington & Payne, 156; *Ante*, p. 127, note; *Rez v. Wheeler*, 7 Carrington & Payne, 170; *Regina v. Pulham*, 9 Carrington & Payne, 280; *The State v. Hazard*, 2 Rhode Island Rep. 474; *Commonwealth v. King*, 9 Cushing, 284; *The State v. Coppenburg*, 2 Strobhart, 273; *The State v. Murphy*, 6 Alabama, 845; *The People v. Caswell*, 21 Wendell, 86; *The State v. Ives*, 13 Iredell, 338; *Swaggerty v. The State*, 9 Yerger, 338. And see *Rez v. Thomas*, 2 East, P. C. 781. The confusion and doubt on this subject seem to have arisen from not clearly distinguishing between a receiving as accessory, and a receiving as for a substantive felony. In some of the cases cited above, this distinction has been carefully observed. "The offence is not," said Brayton, J., in *The State v. Hazard*, 2 Rhode Island Rep. 474, 480, "as was said by Tindal, C. J., in

Rez v. Jervis, ubi supra, the receiving of stolen goods from any particular person, but the receiving, knowing them to have been stolen; it is not that of an accessory, which requires the name of the principal to be alleged, and what would follow necessarily, that the receipt must be from him to make him accessory."

If it be alleged in the indictment that the principal felony was committed by A. B., it must be proved that A. B. committed the felony, otherwise the receiver must be acquitted. *Rez v. Woolford*, 1 Moody & Robinson, 384; *Commonwealth v. King*, 9 Cushing, 284, on the authority of *Rez v. Woolford*. See *Rez v. Elsworthy*, 1 Lewin, C. C. 117. But a contrary doctrine has been maintained by respectable authorities. *The State v. Coppenburg*, 2 Strobhart, 273; *The People v. Caswell*, 21 Wendell, 86; 1 Gabbett, *Crim. Law*, 841; 2 Deacon, *Crim. Law*, 1092. And in *Regina v. Craddock*, as reported in 4 Cox, C. C. 410, Pollock, C. B., said: "In that case, (*Rez v. Woolford*,) the learned judge seems to have entertained some doubt whether his direction was right; but it became unnecessary to con-

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sider the matter further, as the prisoner was acquitted altogether. If the indictment against an accessory state the larceny to have been committed by some person to the jurors unknown, it is no objection that the grand jury, at the same term of the court, find a bill for the principal felony against J. S. *Rex v. Bush*, Russell & Ryan, C. C. 372.

In a very recent case, in England, the indictment in the first count charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. It was held, that there was no repugnancy; for that, although the word "aforesaid" in a subsequent count virtually incorporates all the necessary averments as to time and place in that count, the words, "so as aforesaid feloniously stolen," did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by some person. *Regina v. Craddock*, 2 Denison, C. C. 81; Temple & Mew, C. C. 361; 1 Eng. Law and Eq. Rep. 563, (1850.)

It is necessary that the goods received shall appear to be the very goods stolen, or part thereof. A. and B. were indicted, A. for stealing six bank-notes of £100 each, and B. for receiving "the said notes." A. stole the notes, changed them into notes of £20 each, some of which he gave to B.; and it was held, that B. could not be convicted, for he did not receive the notes that were stolen. *Rex v. Walkley*, 4 Carrington & Payne, 132. Therefore, if the goods stolen have been altered between the time of the larceny and that of the receipt, so as to pass under a new denomination, the indictment should correspond with the fact. Yet, where the indictment charged the principal with stealing one live sheep, the goods, &c., of J. L., and the accessory with receiving "twenty pounds of mutton, part of the goods, &c., so as aforesaid feloniously stolen, &c.," the conviction was held to be proper; though the thing received passed under a different denomination from that which was

stolen. *Rex v. Cowell*, 2 East, P. C. 617, 781.

It is laid down in the text-books, that an indictment against a receiver of stolen goods, charging him as an accessory, need not allege time and place to the fact of stealing the goods; it is sufficient if they be alleged to the fact of the receipt; and *Stott's case*, 2 East, P. C. 751, 753, 780, is uniformly cited to sustain the proposition. 1 Gabbett, Crim. Law, 840; 2 Russell, Crim. Law, (3d London ed.) 243; 2 Deacon, Crim. Law, 1090; 1 Starkie, Crim. Pl. (London ed. 1828,) 169. The precedents, also, in 2 Starkie, Crim. Pl. 483, 484, of indictments for misdemeanor in receiving stolen goods, appear to be framed on *Stott's case*. This case is thus stated in 2 East's Pleas of the Crown, 780: "The indictment against a receiver of stolen goods need not allege time and place to the fact of stealing the goods; it is sufficient if they be alleged to the fact of the receipt. This was expressly decided upon consideration in *Stott's case*, upon an indictment against him as a receiver of pieces of iron, which was removed into B. R. by writ of error, after judgment against him of imprisonment by the Quarter Sessions; though ultimately the court gave no opinion on the rest of the case, the writ of error being abandoned by the prisoner. It appeared on inquiry of the clerks of assize of the Western and Oxford circuits, and of the clerk of arraigns at the Old Bailey, that such had always been the form of indictment used by them." But in *Regina v. O'Connor*, 5 Queen's Bench Rep. 17, 35, (1843,) which was an indictment for conspiracy, Lord Denman, C. J., said: "An objection was also taken to the fourth count, on the score of the venue, a material fact being alleged without place. *Stott's case*, reported in 2 East's Pleas of the Crown, was thought to bear directly on this doctrine, and was not successfully distinguished in the argument. But the Master of the Crown Office has found the paper book in that case, on which Ashhurst, J., took his note of the argument, conducted by Lord Abinger on the one side, and the late Mr. Justice Vaughan on the other, in Michaelmas Term, 1798.

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The indorsement of that learned judge intimates that the case stood for further argument. The prisoner was convicted in April, and then sentenced to twelve months' imprisonment, more than half of which expired before the argument; and there is every reason to suppose that Sir E. H. East is mistaken in reporting that case as decided. Indeed he himself intimates, p. 753, that if there was error in the sentence, it might possibly have been amended by being changed into transportation for fourteen years, and that the prisoner's counsel was aware of the danger that might attend the success of his argument."

In Indiana, it has been decided that time and place need not be alleged to the fact of stealing the goods. *Holford v. The State*, 2 Blackford, 103. Scott, J., delivered the opinion of the court as follows: "Holford was indicted in the Dearborn Circuit Court for receiving stolen goods; on which indictment there was a verdict of conviction and judgment. The errors assigned are, that the indictment does not allege any time and place when and where the goods were stolen; and that, on the trial, there was no evidence to prove that the said goods were stolen within the State of Indiana. To test the validity of the errors assigned, it is necessary only to revert to the statute creating the offence. The words of the statute are as follows, to wit, 'every person who shall buy or receive stolen goods, knowing the same to be stolen, shall, upon conviction, be punished,' &c. Rev. Code, 1824, p. 140. In an indictment, every material fact ought to be alleged, with the certainty of time and place; and every fact is material, which is necessary to constitute the crime charged in the indictment. That the goods mentioned were stolen goods, and that the defendant received them, knowing them to be such, were material facts to be alleged and proved, because they are the facts which constitute the offence; but the time and place of stealing the goods need not be alleged, because the defendant is not charged with the larceny. If it were necessary, by averment and proof, to connect the time

and place of the stealing with the act of receiving, it would, for the same reason, be necessary also to connect the same circumstances with his knowledge of the fact, that the goods were stolen. If such were the law, no offender could be convicted under this statute without proof, not only of his having received stolen goods knowing them to be such, but also of his knowledge of the precise time and place of the original larceny. And yet it is easy to conceive a case, in which a man might be guilty of the offence of knowingly receiving stolen goods, without either the offender or the witnesses having any knowledge of the time and place of the felonious taking. If these positions be correct, it clearly follows that any evidence which might have arisen in this case, going to show the time and place of the original larceny, was unnecessary to support the charge in the indictment."

As the guilty knowledge is the gist of the offence, it is obviously essential that the averment of it should be correctly made. Where an indictment against a receiver, who was tried with the principal, contained a defective statement that the receiver knew the goods to have stolen, omitting the word "been," the judges thought the indictment to be bad, this being the gist of the offence; but they afterwards took time to consider. *Rex v. Kernon*, 2 Russell, Crim. Law, (London ed. 1843,) 251. But in *Redman's case*, 1 Leach, C. C. (4th ed.) 477, a similar averment was held to be sufficient. And where an indictment charged the defendant, by the name of "Francis Morris," with receiving stolen goods, "the said Thomas Morris well knowing," &c.; it was holden that the words, "the said Thomas Morris," might be rejected as surplusage; for the allegation of knowledge would then be perfectly consistent with the preceding matter. *Rex v. Morris*, 1 Leach, C. C. (4th ed.) 109. See, also, *Regina v. Crespin*, 11 Queen's Bench Rep. 913. In a very recent case, a count alleged that the prisoner received the goods of A. B., "he, the said A. B., then knowing them to have been stolen." Upon motion in arrest of judgment, the count

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was held to be fatally defective for the want of a *scienter*. *Regina v. Larkin*, 6 Cox, C. C. 377; 26 Eng. Law and Eq. Rep. 572, (1854.) Lord Campbell, C. J., said: "How can the name be struck out? The next antecedent to which the word 'he' refers would still be the prosecutor and not the prisoner. In *Rex v. Morris*, ubi supra, it was a mere misnomer; the party was rightly described as to his surname, but not as to his Christian name."

The Rev. Sts. of Massachusetts, ch. 126, § 20, enact, that "every person who shall buy, receive, or aid in the concealment of any stolen money, goods, or property, knowing the same to have been stolen, shall be punished," &c. This section describes only one offence which may be committed either by buying, receiving, or aiding in the concealment of stolen goods; and an indictment charging a defendant with buying, receiving, and aiding in the concealment of such goods, charges only one offence. *Stevens v. The Commonwealth*, 6 Metcalf, 241. But see *contra*, *The State v. Murphy*, 6 Alabama, 845. Where an indictment charges a defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describes each article, and avers the value thereof, and he pleads that he is "guilty of receiving fifty dollars' worth of said property, in manner and form as set forth in the indictment," no valid judgment can be rendered against him on such plea. *O'Connell v. The Commonwealth*, 7 Metcalf, 460. The indictment must allege that the property was received with a felonious or fraudulent intent. *The People v. Johnson*, 1 Parker, Crim. Cases, 564.

In New York, in an indictment upon a statute of that State, which enacts, that "every person who shall buy, or receive in any manner, upon any consideration, any personal property," &c., it is not necessary to allege that the property stolen was received upon any consideration passing between the thief and the receiver. *Hopkins v. The People*, 12 Wendell, 76. "It is obvious," said Nelson,

C. J., "that the intent and meaning of the act is to make it an offence for any person to buy or receive in any manner, or upon any consideration, goods, knowing them to be stolen; and so the section was reported by the revisors. The buying or receiving goods upon a consideration was, no doubt, specified particularly with a view to rebut any pretence that might be set up by way of defence, that the goods were purchased for a valuable consideration. It would be strange, indeed, that the legislature should have intended to restrict the offence to cases where the property was received upon consideration passing between the thief and receiver, and not embrace cases where it was received without consideration. The offence is the receiving of goods knowing them to have been stolen; and whether received upon or without consideration, does not affect the criminality of the act."

In *The State v. Watson*, 3 Rhode Island Rep. 114, (1855,) it is decided, that in an indictment for receiving stolen goods, it is not requisite to assign a money value to every article received. It is sufficient, if the description of the goods be such as to show that they are of some value. The indictment alleged that all the articles collectively were of the value of seventy dollars. The jury found, by their verdict, that the defendant received only a part of the articles enumerated. *Staples*, C. J., delivered the opinion of the court: "Unless there be some intrinsic value in a thing, no person taking it can be guilty of theft; nor can a person be guilty of receiving a thing as stolen, knowing it to be stolen, unless it be a thing the taking of which would be theft. The description in the indictment, of which the jury found that the defendant did receive, knowing them to be stolen, imported an intrinsic value in them.¹ The jurisdiction of this court over this offence does not depend on the value of the stolen goods received. If they are of any value, the court has jurisdiction. It was not necessary to allege or prove any specific value, in order to confer jurisdiction on

¹ The value of this case is impaired from the fact, that the indictment is not set out in the report.

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the court. The common-law jurisdiction between grand and petit larceny has been long abolished in this State. It was not necessary, therefore, to allege or prove any specific value, in order to define the offence committed; and as the punishment does in no sense depend on the value, it was not necessary to allege or prove any specific value in order to the infliction of the kind or amount of punishment. There seems, therefore, no reason for burdening the record with allegations of the value of goods stolen, if the description of them be such as to show that they were of some value."

The State v. Watson, is partially in conflict with the well-considered and correctly decided case, *Hope v. The Commonwealth*, 9 Metcalf, 134. "The well-settled practice," said Dewey, J., "has been that of stating in the indictment the value of the article alleged to have been stolen. Such is the rule, as stated in 2 Hale, P. C. 182; 3 Chitty, Crim. Law, (4th Amer. ed.) 947, a; 1 Ibid. 238; and *Commonwealth v. Smith*, 1 Massachusetts, 245. The reason for requiring this allegation and finding of value may have been, originally, that a distinction might appear between the offences of grand and petit larceny, in reference to the extent of punishment; that being graduated, in some measure, by the value of the article stolen. Our statutes prescribe the punishment for larceny with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long-established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment, and that, where an indictment alleges a larceny of various articles, and adds only the collective value of the whole, such allegation is not sufficient, where the defendant is not found guilty of the larceny of the whole."

With respect to the form of the indictment, it is further to be observed, that in the case of *Rex v. Galloway*, 1 Moody, C.

C. 234, (1829); and in *Rex v. Madden*, 1 Moody, C. C. 277; 1 Lewin, C. C. 83, (1830,) it was decided by the judges unanimously, that it was no objection, in point of law, that an indictment charges prisoners in one count as principals, in stealing the goods, and in another as receivers; but the judges were equally divided on the question, whether the prosecutor should not have been put to his election, and thereupon they all agreed that directions should be given to the respective clerks not in future to put both charges in the same indictment.

In America, it has been held, that counts for stealing and receiving stolen goods may be joined in the same indictment, and although, in his discretion, the judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts cannot prejudice the defendant. *Hampton v. The State*, 8 Humphrey, 69; *The State v. Hazard*, 2 Rhode Island Rep. 474; *Weinzorpflin v. The State*, 8 Blackford, 186. In *Hampton v. The State*, above cited, the indictment contained two counts, one for stealing, the other for receiving. The motion to compel an election was made before plea pleaded, and it was held, that it is discretionary with the court either to quash the indictment or compel an election; but that it is no ground for error or motion in arrest of judgment. And a receiver may be indicted as an accessory in one count, and for a substantive felony in another count. *Rex v. Austin*, 7 Carrington & Payne, 796; *Rex v. Hartall*, 7 Carrington & Payne, 475; *Rex v. Wheeler*, 7 Carrington & Payne, 170; *Regina v. Pulham*, 9 Carrington & Payne, 281.

In an indictment against a married woman, for receiving stolen goods, it is unnecessary to aver that, at the time, she was not acting under the coercion of her husband. *The State v. Nelson*, 29 Maine, 329. H.

REX v. HILL.¹

Easter Term, 1811.

Evidence — Divisible Averments.

Upon an indictment for obtaining money by false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by that part, is sufficient.

THE prisoner was tried before Mr. Justice CHAMBER, at the Taunton Lent Assizes, in the year 1811, upon an indictment under the 30 Geo. 2, ch. 24, for obtaining promissory notes and money by false pretences.

There were six counts in the indictment, of which the first was abandoned.

The second count, after stating a discourse between Benjamin Browning and Richard Parker, described to have been severally seamen in the king's navy, and discharged from the service, and the prisoner, about pensions, to which Browning and Parker, as such seamen, were supposed to be respectively entitled, and about an application by letter, supposed to have been made for such pensions by the prisoner, set out the false pretences alleged to have been made by the prisoner to Browning and Parker, which were, that he, the prisoner, had received an answer to his said letter of application, and produced a paper as such answer, and pretended to them that two guineas must be sent up to the under clerks, as fees, *which they always expected, and that nothing could be done without it.* The indictment went on to state, that by these pretences the prisoner obtained from Browning, on behalf of himself and Parker, two promissory notes for £1 each, and two shillings in money, Browning's property, with intent, &c.

The third count contained no material variation from the second, except that it stated the discourse to have been between the prisoner and Browning only, but relating to the respective pensions of Browning and Parker, and stating the sum required to be sent up for fees to be one guinea from each.

The fourth count stated a discourse between the prisoner and John Bennett, (another discharged seaman,) respecting the pension he was supposed to be entitled to, an offer by the prisoner to apply on his

¹ Russell & Ryan, C. C. 190.

Evidence — Divisible Averments.

behalf for it, and write a letter for the purpose ; and that he falsely pretended that a pound note must be sent up by Bennett, as a fee to the head clerk, *and that nothing could be done without it*. By which false pretence he obtained of Bennett a note for one pound, his property, with intent to defraud him.

The fifth count stated a discourse between the prisoner and Browning, concerning the pensions of which the said Browning, Parker, and Bennett (the three discharged seamen) were supposed to be entitled to, and concerning a supposed letter written by the prisoner and the supposed answer to it ; and then stated the false pretences made by the prisoner to Browning to be, that the prisoner had heard from his friend, (the head clerk,) and that they (the three seamen) must send him (the supposed head clerk) a guinea for writing letters ; and that the head clerk had informed him that they were to have six years' back pay. By which the prisoner obtained from Browning another promissory note for one pound, and another shilling in money, his property.

The sixth count alleged the prisoner's discourse to be with all the three persons, and that the prisoner produced another letter, which he falsely pretended to have received from his friend, informing him that the pensions were allowed and every thing settled, but that the pensioners must either go to London to be passed, or his (the prisoner's) going would be quite as well, and have the same effect, if they would pay his expenses. Whereby he fraudulently obtained from Browning another promissory note for one pound, and twelve shillings in money, being his note, chattels, and moneys, and from Bennett ten shillings of his money, with intent to defraud them respectively.

At the close of the evidence, several objections were taken by the prisoner's counsel.

One of these objections, applying to all the counts but the fourth, was, that Parker (who died before the trial) was not proved to have been a discharged seaman, as alleged.

In fact, there was no direct evidence of a discharge ; but Browning, in his evidence, described Parker as having been his shipmate, and proved that the prisoner acted or pretended to act under Parker's employment, as such discharged seaman ; that, at the time of the transaction, Parker was resident at Bath, and that the prisoner at one time expressed doubts whether he should succeed in getting Parker's pension, because he had not obtained a certificate of his discharge.

Another objection, applying to the second, third, and fourth counts, was, that as the pretences were necessary to be specifically stated in the indictment, they should be proved precisely as stated ; and that

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the representation in the second and third counts, "that the clerks always expected fees," and the further statement in those counts, as also in the fourth, "that nothing could be done without it," were not proved, as in fact they were not.

Another objection was also made to the indictment, that it did not bring the case within the statute, inasmuch as promissory notes being merely *choses in action*, they could not be considered as *money, goods, wares, or merchandises*, which are the words of description in the statute.

But if this were a good objection, which the learned judge thought it was not, it could only go to the fourth count, all the others charging the obtaining money as well as notes.

Another objection to the evidence on the fourth count was, that Bennett proved that the prisoner's pretence was, that a guinea, and not a pound note, as was alleged in that count, must be sent up to the head clerk.

Bennett's evidence was, that although the prisoner at first pretended that a guinea was necessary to be sent, yet he took a note for one pound for the purpose.

The case, in all other particulars, was satisfactorily proved, and the objections being overruled, the jury found the prisoner guilty, and he received sentence; but the learned judge reserved the consideration of the objections for the judges, that the prisoner might have the benefit of a recommendation for a pardon, if they should be of opinion that the objections affected all the counts in the indictment so as to have entitled the prisoner to an acquittal.

In Easter Term, 1811, at a meeting of all the judges, (except Lord Ellenborough, Thomson, B., and Le Blanc, J.,) the conviction was held right on all the counts but the fourth; the fourth count was held bad, because the judges thought bank notes were not money, goods, &c., within the act.

It is a general rule; which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of an offence punishable by law, and for which he may by law be convicted on that indictment. *Rex v. Hollingberry*, 4 Barnewall & Cresswell, 329, 330; *Rex v. Hunt*, 2 Campbell, 583, 585; *Commonwealth v. Griffin*, 21 Pickering, 523. Thus, in the case of an indictment for treason, it is not necessary to prove all the overt acts which are laid, nor all the circumstances of any overt act which may be set forth; it is sufficient if but one of several overt acts be well laid and proved; and though any unnecessary circumstances should be set forth, they need not be proved, but may be rejected as surplusage. Foster, Crim. Law, 194; 2 Gabbett, Crim. Law, 415. And so in an indictment for obtaining money by false pretences, though the offence must not only be distinctly set out, but proved without any substantial variance, yet it is not necessary that all the false pretences set forth

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in the indictment should be proved; it will be sufficient if any entire allegation of pretence and falsehood be sustained, provided it shall also appear that the cheat was effected by means of such falsehood. *Commonwealth v. Morrill*, 8 Cushing, 571; *The State v. Mills*, 17 Maine, 211; *The State v. Dunlap*, 24 Maine, 77; *The People v. Haynes*, 11 Wendell, 557. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under certain circumstances, if, upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only. So if a misdemeanor at common law be made additionally penal by statute, if committed under certain circumstances, the defendant shall be convicted only of the misdemeanor at common law, if the prosecutor succeed in proving the commission of the offence, but fail in proving that it was committed under the circumstances specified in the statute." 2 Hale, P. C. 191, 192; Archbold, Crim. Pl. (London ed. 1853,) 180, 181. Upon an indictment for murder, if the prosecutor fail in proving the malice prepense, the defendant may be convicted of manslaughter. *Rex v. Mackalley*, 9 Coke, 67 b. Or, on a charge of burglary and stealing goods, if no burglary be proved; or of robbery, if the property be not taken from the person by violence or putting in fear, the prisoner may be convicted of the simple larceny. 2 Hale, P. C. 302. Where the defendant was indicted for stealing a colt, it was holden that he could not be convicted under the stat 1 Edw. 6, ch. 12, § 10, which did not mention colts, but might be convicted of the simple larceny. *Rex v. Beaney*, Russell & Ryan, C. C. 416. Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *The State v. Hascall*, 6 New Hampshire, 352. See *Regina v. Rhodes*, 2 Lord Raymond, 886. Upon an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to pre-

vent one workman from working. *Rex v. Bykerdike*, 1 Moody & Robinson, 179. Upon an indictment for an assault upon an officer, while in the discharge of the duties of his office, and obstructing and hindering him therein, the defendant may be convicted of a simple assault. *Commonwealth v. Kirby*, 2 Cushing, 577. The Rev. Sts. of Massachusetts, ch. 127, § 15, enact, that any person having in his possession ten or more pieces of counterfeit coin, with intent to utter or pass the same as true, shall be punished by imprisonment for life, or any term of years; § 16 enacts, that any person having less than ten pieces shall be punished by imprisonment, not more than ten years, &c. Upon an indictment charging the defendant with having more than ten pieces, proof of his having less than ten is sufficient to warrant a conviction, and the convict may be sentenced under § 16. "The substance of the crime," says Shaw, C. J., "is the possession of counterfeit coin, with the guilty knowledge and intent indicated, and this is a substantive offence, whether the number of pieces be over or under ten. The party was therefore found guilty of the offence stated, although not to the extent laid in the indictment." *Commonwealth v. Griffin*, 21 Pickering, 523. The same principle of law was recognized and adopted in *Commonwealth v. Kneeland*, 20 Pickering, 206, which was an indictment for blasphemy.

The distinction above considered applies, where an indictment contains divisible averments. If the indictment charges that the defendant did, and caused to be done, a particular act, as "forged and caused to be forged," it is enough to prove either one or the other. By Lord Mansfield, in *Rex v. Middlehurst*, 1 Burrow, 400. If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. *Rex v. Hunt*, 2 Campbell, 583; *Rex v. Williams*, Ibid. 646. So where the prisoner was indicted for having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administra-

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tion of justice into contempt, Bayley, J., told the jury, that if they were of opinion that the defendant had published the libel with either of those intentions, they ought to find the prisoner guilty. *Rex v. Evans*, 3 Starkie, Rep. 35. Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her, and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention, carnally to know her, Holroyd, J., held, that the averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse, simply. *Rex v. Dawson*, 3 Starkie, Rep. 62. So, of an alleged intent to defraud A., where the proof is an intent to defraud A. and B. *The State v. Veazie*, 7 Greenleaf, 131. On an indictment on the 7 Geo. 3, ch. 50, § 1, alleging the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either was held sufficient. *Rex v. Ellins*, Russell & Ryan, C. C. 188. And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. An indictment for embezzling need not specify the exact sum embezzled; as where the indictment charged the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one one pound notes in the sum of money embezzled, this was held to support the indictment. *Rex v. Carson*, Russell & Ryan, C. C. 303. Where an information for publishing a libel contained an averment that outrages had been committed in and near the neighborhood of Nottingham, it was held that the averment was divisible, and that it was sufficient to prove that outrages had been committed in either place. *Rex v. Sutton*, 4 Maule & Selwyn, 532. In larceny, if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant, it is sufficient. 2 Hale, P. C. 302. Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is

sufficient to prove that he extorted one shilling. Per Holt, J., *Rex v. Burdett*, 1 Lord Raymond, 149.

It remains to consider how far averments, charging defendants with a joint offence, are divisible. These averments of joint offences are divisible, (as to the degree of criminality in the several persons charged,) where the offence is of such a nature as that the defendants may act a different part in the transaction; and if the evidence affects them differently, the judge may select such parts as are applicable to each, and leave their cases separately to the jury. And it was, accordingly, held by the judges, in the case of *Butterworth, Braithwaite, and Moss*, who were indicted for a burglary, in breaking into the dwelling-house of W. K. in the night time, and stealing therein to the value of 40s., that upon such an indictment the offence of one might be aggravated by burglary in him alone; because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking; and, accordingly, there was judgment against Moss for the burglary and capital larceny, and against the other two for the capital larceny. Russell & Ryan, C. C. 520. But it is important to observe, says Gabbett, (2 Crim. Law, 416,) first, that this was a single or continuing transaction, in which all the defendants joined or co-operated; and, secondly, that the judgment, as against all the prisoners, was for a capital felony, and the same; and it is distinguishable, in these respects, from the case of *Mary and John Messingham*, where the defendants were charged jointly with receiving stolen goods; and it was decided, on a case reserved, that as on this joint charge it was necessary to prove a joint receipt, and as it appeared from the evidence that Mary Messingham was absent when John Messingham received the goods, her receipt afterwards was to be considered as a separate transaction, and the conviction therefore wrong. 1 Moody, C. C. 257. In such case, judgment may be

Larceny — Actual and Constructive Possession.

given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. *Regina v. Dovey*, 2 Denison, C. C. 86; 4 Cox, C. C. 428; 2 Eng. Law and Eq. Rep. 532. And the case of *Butterworth, Braithwaite, and Moss*, supra, is also to be distinguished from the case of *Hempstead and Hudson*, where there was no evidence to show that the articles which they were charged with stealing jointly, from the dwelling-house of J. B., were not taken by the prisoners at different times and unknown to each other, (though the property was found upon them all at one time, and the prisoners were in the same room together); and the jury, therefore, found Hempstead guilty of stealing to the value of six pounds, and Hudson guilty of stealing to the value of ten shillings, (which the goods found upon them, respectively, were worth,) by which the prisoners would be subject to two distinct judgments—the one for a capital offence, the other for simple larceny. The judges were of opinion that, upon this finding, judgment could only be given against one,—upon a

nolle prosequi being entered as to the other, who stood second upon the indictment.

It was holden in *Rex v. Turner*, 1 Sid. 171, where several were jointly indicted for a burglary, that the jury could not find one guilty of burglary and the other of larceny only; “but there the very nature of the case,” says Starkie, 1 Crim. Pl. (2d ed.) 38, “precluded such a finding, for the evidence was the same as to all.” In accordance with the decision of the majority of the judges in the case of *Butterworth, Braithwaite, and Moss*, ubi supra, is the reasoning of Starkie, 1 Crim. Pl. (2d ed.) 38. He there says: “In the case of burglary, if it appeared in evidence that one of the prisoners, who had assisted in the removal of the goods, had been a stranger to the breaking in, and had taken no part in the transaction until after the breaking had been accomplished; there seems to be no satisfactory reason why the jury should not find according to the fact, and why separate judgments should not be pronounced, as if the prisoners had been separately tried and convicted.”

H.

COMMONWEALTH v. JAMES.¹

March Term, 1823.

Larceny — Actual and Constructive Possession.

Where a miller, having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris, it was held to be larceny.

It was held that the government was not bound to produce the truckman who carried the barilla to and from the mill, to prove that it was not adulterated in the transportation, although there was only circumstantial evidence that it was adulterated by the miller.

The word *barilla* is good in an indictment, to denote the subject of larceny.

THE defendant was indicted for stealing three tons weight of barilla.

The prisoner was convicted and sentenced at the Municipal Court, and he appealed to this court.

¹ 1 Pickering, 375.

 Larceny — Actual and Constructive Possession.

At the trial, in November Term, 1822, before PARKER, C. J., it was in evidence that Park, having a quantity of barilla which he wished to have ground, sent it to a mill kept by the prisoner for grinding plaster of Paris, barilla, and other articles; that after it was ground, a mixture, consisting of three fourth parts of barilla and one fourth part of plaster of Paris, was returned by the same truckman who carried the barilla to the mill, he being on both occasions in the employment of Park.

The prisoner's counsel contended, that, it appearing that the barilla was sent to and brought from the mill by a truckman, who for aught appearing in the case, was alive and within the reach of the process of the court at the time of trial, without his testimony there was no legal proof that the barilla was ever delivered to the prisoner, or the mixture received from him. But there being evidence that the barilla was ground at the prisoner's mill, by his order, he being sometimes present, and a bill of the expense of grinding having been made out and presented by him and the money received by him, there being also evidence tending strongly to show that he had practised a fraud upon the barilla, the objection was overruled; and whether the mixture was accidental or fraudulent, and whether it was caused by the prisoner or not, were questions left to the jury to decide; upon a great deal of circumstantial evidence, no person having seen him do it, and the laborer who had the immediate charge of the grinding having sworn that no mixture was made except what was accidental.

It was likewise contended, that supposing the facts to be as the evidence on the part of the government tended to prove them, the case made out was not larceny, but only a breach of trust, or at most a fraud, with which the prisoner was not charged in the indictment. On this point the jury were instructed, that if they were satisfied from the evidence, that the prisoner had taken from the parcel of barilla any quantity with a view to convert it to his own use, introducing into the mass an article of inferior value for the purpose of concealing the fraud, he was guilty of larceny.

The jury having found a verdict against the prisoner, he moved for a new trial on account of these directions of the judge.

Rand and *Hooper*, for the prisoner, argued, that the government should have shown a good reason for not calling the truckman, before it could resort to evidence of an inferior nature. *Commonwealth v. Kinison*, 4 Mass. 646; *Williams v. The East India Company*, 3 East, 192. No evidence produced was so strong as his testimony would have been. It does not appear that the barilla was not changed by him.

[PUTNAM, J. Suppose he had changed it, could he be made to testify his own fraud?]

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The government might have produced him, and if he had refused to testify, it would have been a strong circumstance in favor of the prisoner.

Admitting the facts to have been duly proved, the question is, whether they constitute larceny, or only a breach of trust, or at most a fraud. The general doctrine is, that where possession is obtained by permission of the owner, without fraud, larceny cannot be committed. Here the prisoner came to the possession of the barilla by the delivery of the owner, upon a contract to grind it for him, and for this purpose he was obliged to separate every part from the rest. There was no possession taken different from that intended to be given. The prisoner has only been guilty of a breach of contract, in not returning the same article that was delivered to him. It is a case where confidence is reposed, and where the party injured has as good a remedy as he ought to have by a civil action, and the interest of the public does not require a prosecution by indictment. To say that the mere separation of part of an article from the rest, by the person to whom the whole control over it is given, shall be larceny, would do away the whole distinction between civil injuries and crimes.

To constitute larceny, there must be a felonious taking. Every larceny, it is said, includes a trespass. We say further, it includes a trespass for which *de bonis asportatis* will lie.

In 13 Ed. 4, fol. 9, a carrier broke open a bale, and so committed a trespass which made it larceny. It would not have been larceny if he had sold the whole bale. This is a nice distinction, and the most reasonable ground of it seems to be that which is assigned in East's Cr. Law, that such a possession was not delivered to the carrier, as he took, himself. The case did not turn on the point of a separation of part of the goods, put on the point that the goods in the bale were not delivered, and so it is considered by Lord Hale. It is like the case where the key of a room was given to a servant; the articles in the room were not delivered to him, but the key was given him only, to keep the room. In many cases, things might be given in a bale to a carrier which he would not know of, and which the owner would be unwilling to intrust to him separately.

In Kelyng, 35, a man who came to work at the house of a silk throwster stole a part of the silk delivered to him to work. There the owner had never parted with the possession. It appears from Kelyng that the case would have been different, if the silk had been delivered to the workman to carry to his own house.

The case in Roll. Abr. 73, is, "If a man says to a miller who keeps a mill, Thou hast stolen three pecks of meal, action lies; for although the corn was delivered him to grind, still if he steals the meal, this is felony, being taken from the residue." It was an action

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of slander, in which the question of larceny came only incidentally before the court. It might be slander to say a miller dishonestly took meal, whether the taking it would be larceny or not. All the facts are probably not stated. No doubt a miller may be guilty of larceny in taking meal; as suppose the meal had been put into sacks for the owner and the miller took some of it out; this would be larceny. It does not appear that the mill in that case was not a soke mill, to which persons were obliged to carry their corn, and the miller might be said to get it by a delivery that was not voluntary.

In the case of *Cartwright v. Green*, 8 Ves. 405, a person to whom a bureau was delivered to be repaired, discovered money in a secret drawer and embezzled it. This was held to be felony, because, having no occasion to break open this drawer, he did what was not warranted by the purpose for which the bureau was delivered.

It was held in *Rex v. Channel*, 2 Str. 793, that an indictment would not lie against a miller for detaining part of the corn; and *The King v. Haynes*, 4 M. & S. 214, is cited in Russell on Crimes, 68, to show that an indictment will not lie against a miller for delivering a mixture of oat and barley meal different from the produce of the barley received by him to be ground, there being neither false tokens nor conspiracy.

The cases before mentioned were those most dwelt upon by the counsel. The following authorities were also cited: Bac. Abr. Felony, C; 2 East's Crim. Law, 655, 693; 2 Russell, 1051; 1 Hale's P. C. 504, 509; 1 Hawk. P. C. ch. 33; 3 Chetwynd's Burn's Justice, 182, and *Peck's case*, Ibid. 188; 3 Inst. 107; Dalt. Just. ch. 102; Stamf. P. C. 25; Glanv. lib. 10, ch. 13; Horne's Mirr. 242.

The word *barilla* is also unintelligible, being a Spanish word. *Kelp* is the proper word. Bailey's Dictionary. *Barilla* is the plant, and is translated *glasswort* in Baretti's Dictionary.

Morton, Attorney-General. The word *barilla* is used in U. S. Laws, 14 Cong. 1 Sess. ch. 107, § 2.

With respect to the evidence, the same fact may be proved by different modes of evidence in the same kind of cases; for instance, the fact of marriage in *Commonwealth v. Catlin*, 1 Mass. 9, and *Milford v. Worcester*, 7 Mass. 48. The best evidence of which the nature of the case admitted was given, to prove that this very *barilla* was received into the prisoner's custody. He gave a bill for the grinding, and was paid for it. This amounts to a confession of the party.

But the most important question is, whether the facts proved constitute larceny. Where goods are bailed generally, a conversion is only a breach of trust; but where they are bailed for a specific purpose, a conversion of the whole has sometimes been held a felony, and in all cases a conversion of a part is felony. 1 Hale, P. C. 504,

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505; 1 Hawk. ch. 34, § 10; 1 Roll. Abr. 73; 4 Bl. Comm. 230; 2 East's Cr. L. 695. The barilla was delivered to the prisoner for the purpose of being ground and returned. When he separated part of it in order to retain it, it was felony, according to the case in 8 Ves. 409, before cited. In the case in *Strange*, the indictment did not allege actual force, and in *Maule & Selwyn*, Lord Ellenborough means only that the offence as there set forth was not indictable. In neither of these two cases did the question of larceny arise.

PUTNAM, J., delivered the opinion of the court. The objection which has been made as to the description of the subject-matter of the larceny cannot prevail. It is said that *barilla* is not an English word; and several English dictionaries have been mentioned which do not contain it. But it is found in Rees's Cyclopædia, — in the act of Congress it is mentioned as merchandise to be imported free from duty, — and in Ure's Chemical Dictionary, it is also described as a term given in commerce to the impure soda imported from Spain, &c.

A more important objection was made, namely, that the best evidence had not been produced, and therefore that the conviction was not warranted. It is said that the truckman who carried the barilla to and from the mill ought to have been produced, to prove that it was not adulterated in the transportation.

The question upon this part of the case is, whether any other evidence would have been equivalent to that which the truckman might be supposed to have given. Of that we have no doubt. The fact to be proved was, that the defendant stole part of the barilla. He is not charged for the fraud of mixing any other substance of inferior value with it, but for a larceny. Now if the defendant had confessed the fact, that would surely have been sufficient evidence. What evidence was in fact produced is not judicially before us; it was sufficient to satisfy the jury, and did not depend upon the evidence which the truckman may have been supposed to have possessed. It is not like the case where a signature is to be proved by a subscribing witness, who might be produced, and who alone knows the fact to be established.

In the case of *Commonwealth v. Kinison*, 4 Mass. 646, to which we have been referred, the fact to be proved was the identity of a counterfeit bill; it had no artificial marks, and had been out of the possession of the witness and in the possession of the magistrate for two or three weeks. The magistrate was not called; and it was held very properly, that, as there were no private or artificial marks on the bill, it was not identified without the testimony of the magistrate. If there had been any artificial marks, to which the witness who was produced could have testified, that would have been sufficient.

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In another case cited by the defendant's counsel, *Williams v. The E. L. Company*, 3 East, 192, the party did not produce the best evidence in his power, and he failed of course to recover. The fact to be proved was, that the defendants had put on board of the plaintiff's ship a quantity of oil and varnish of an inflammable nature, without giving him any notice of it, by reason of which the ship was burnt. Two persons only knew whether notice of the inflammable nature of the varnish was given, namely, the mate who received it, who was dead, and the military conductor who delivered it, and who was alive and in the power of the party to produce. The evidence to prove that fact, (upon which the plaintiff's action depended,) arose from the presumption that it was so, because no person who was on board of, or belonged to the ship, had any such notice of the inflammable nature of the material. But that was justly held to be evidence less satisfactory than could be given by the military conductor, who knew certainly how the fact was.

The gist of the prosecution in the case at bar is the stealing, not the adulteration of the barilla. We think that the objection which has been made upon this point of the cause ought not to prevail.

But the main question still remains to be considered; that is, whether the facts which have been proved will warrant a conviction for larceny.

Before proceeding to that, I would remark that the question has been argued by the counsel for the defendant with great learning and ability, and that we have been much assisted by their researches.

To constitute the crime of larceny, there must be a felonious taking and carrying away of the goods of another. It is supposed to be, *vi et armis, invito domino*. But actual violence is not necessary; fraud may supply the place of force.

The jury have found that the defendant took the goods with an intent to steal them; and the verdict is well warranted, if, at the time the defendant took them, they were not lawfully in his possession with the consent of the owner, according to a subsisting special contract, in consequence of an original delivery obtained without fraud. If that was the case, the inference which the counsel for the defendant drew would follow, that such a taking would not be felony, but a mere breach of trust for which a civil action would lie, but concerning which the public have no right to inquire by indictment.

The counsel for the defendant have referred us to 13 Ed. 4, fol. 9, as the authority upon this point. The case was as follows: A carrier had agreed to carry certain bales of goods which were delivered to him to Southampton, but he carried them to another place, broke open the bales, and took the goods contained in them feloniously,

and converted them to his own use. If that were felony or not, was the question. It was first debated in the Star Chamber, where four of the judges held it to be felony, but for different reasons; and one of the judges (Brian) strenuously insisted that it was neither felony nor trespass, because the defendant had the possession by a lawful delivery. The chancellor thought it was felony, and should be determined according to the intent. Molineux thought it might be felony or trespass, according to the intent, and seems to put the case upon the ground of a determination of the contract. "As if he who did the act does not pursue the purpose for which he took the goods; as if a man distrain for damage-feazance, or rent arrere, and afterwards sell the goods, or kill the beasts, there is a tort now, where at the beginning it was good. So, although it was lawful to carry the goods *ut supra*, yet as he took the goods to another place afterwards, he has not pursued the original purpose, and so by his own act afterwards it shall be adjudged felony or trespass, according to his intent." Vavisour did not consider it as a bailment, but that the goods were delivered upon a bargain; that his original intent was to steal and not to carry the goods. "His conduct afterwards proves (says Vavisour) that he took them as a felon, and to another intent than to carry," &c. Choke put the case upon the breaking of the bales and taking out the contents. His opinion was, that if the party had sold the entire bales it would not have been felony, "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony.

Afterwards this matter was argued before the judges in the Exchequer Chamber, and this proposition was held by all, (excepting Nedham,) namely, "that where goods are delivered to a man, he cannot take them feloniously." Nedham thought that "he might take them feloniously as well as another." Brian still persisted in his opinion, and said that the breaking of the bales did not make it felony. But afterwards the judges made a report to the chancellor that the opinion of the majority of them was, that it was felony.

I have been thus minute in examining this case, as it is referred to as the foundation upon which many subsequent decisions rest. It will be perceived that here may be found the distinctions which are recognized in the text-books upon this subject. Thus, if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the delivery were merely colorable, a taking under such circumstances would be felony. So if the goods were delivered originally upon a special contract, which is determined by the fraudulent act of him to whom they were delivered, or by the

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completion of the contract, a taking *animo furandi* afterwards should be adjudged to be felony.

In the application of these general rules to the cases which arise, it is obvious that shades of difference, like the colors of the rainbow, so nearly approach each other, as to render it extremely difficult to discriminate them with satisfactory precision. The humane rule of the law is, that in cases of doubt, the inclination should be in favor of the defendant. The seeming, perhaps real, contradictions to be met with in the English decisions may have been influenced by the desire to save human life.

The case of *Rex v. Channel*, 2 Str. 793, cited for the defendant, was an indictment against a miller employed to grind wheat, stating that he with force and arms unlawfully did take and detain part of it. The indictment was held bad upon demurrer. The reasons assigned in the book are, that there was no actual force laid, and that this was a matter of a private nature; but a better reason seems to us to have been, that there was no averment that the defendant took the wheat feloniously.

The case of *The King v. Haynes*, cited for the defendant from 4 M. & S. 214, was an indictment for a fraud against a miller for delivering oatmeal and barley, instead of barley, which was sent to be ground. It is not for a felony. The court thought no indictable offence was set forth. The question whether the miller had taken any of the corn which was sent to be ground, with an intent to steal it, was not then under consideration.

In the case at bar, the goods came lawfully into the hands of the defendant by the delivery of the owner. If he is to be convicted, it must be on the ground that he took the goods as a felon after the special contract was determined.

I will refer to some cases which illustrate this point. Thus, in *Rex v. Charlewood*, before Gould, J., and Perryn, B., 1786, cited in East's Cr. L. 689, reported in Leach, case 180, the jury were instructed that if they thought the prisoner performed the journey for which he hired the horse, and returned to London, where, instead of delivering it to the owner, he afterwards converted it to his own use, that might be felony; for, said the court, "the end and purpose of the hiring of the horse would be over."

In Kelyng, 35, a silk throwster had men to work in his own house, and delivered silk to one of them to work, and the workman stole away part of it; and it was held to be felony notwithstanding the delivery. East, in his Crown Law, supposes that if the silk had been delivered to be carried to the house of the workman, and he had there converted a part of it to his own use, it could not have been felony; but that as it was to be worked up in the house of the owner,

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it might be considered as never in fact out of his possession. 2 East; P. C. 682, 683. But Kelyng seems to put the case upon the ground of the special contract, "that the silk was delivered to him only to work, and so the entire property remained in the owner."

But whatever may be the true ground of decision in that case, there is a case in 1 Roll. Abr. 73, pl. 16, which is recognized as good law by Hawkins, East, and other writers, which is very applicable to the case at bar. "If a man says to a miller who keeps a corn mill, Thou hast stolen three pecks of meal, an action lies; for although the corn was delivered to him to grind, nevertheless if he steal it, it is felony, being taken from the rest." *Langley v. Bradshawe, in error*, 8 Car. B. R. That decision proceeded upon the ground of a determination of the privity of the bailment. Hawkins observes (bk. 1, ch. 33, § 4,) that such possession of a part, distinct from the whole, was gained by wrong, and not delivered by the owner; and also, that it was obtained basely, fraudulently, and clandestinely.

This remark is peculiarly applicable to the case at bar; for there is no evidence that the owner intended to divest himself of his property by the delivering of it to the defendant. The defendant did not pursue the purpose for which it was delivered to him, but separated a part from the rest for his own use, without pretence of title; and by that act the contract was determined. From thenceforward the legal possession was in the owner, and a taking of the part so fraudulently separated from the rest, *animo furandi*, must be considered as larceny.

The taking of the goods, in order to constitute larceny, may be actual or constructive. Actual, where the goods have been actually taken out of the owner's possession, against his will or without his consent, and which requires no comment or illustration. Constructive, where the owner delivers the goods, but either he does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them. As this subject of constructive possession has given rise to some very nice distinctions, it is necessary to consider it with some minuteness. The cases decided upon it may be classed under the following heads:—

1. Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also.

2. Where the possession has been obtained *animo furandi*.

3. Where the possession was originally obtained *bonâ fide*, and without a felonious intent.

4. Where the delivery does not alter the possession in law.

First. As to the cases where, by a delivery of the goods, not only the possession, but the right of property also, passes.

It is clear that no subsequent conversion, by the person in whom the right of property has thus vested, can be construed into larceny, whatever the intent of the party may be. As, for instance, where goods are sold upon credit and delivered, no conversion of them by the vendee can amount to larceny. *Blunt v. The Commonwealth*, 4 Leigh, 689; *Ross v. The People*, 5 Hill, (N. Y.) 294; *Mowrey v. Walsh*, 8 Cowen, 238; *Lewer v. The Com-*

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monwealth, 15 Sergeant & Rawle, 93. Where the defendant bought a horse at a fair of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "Very well;" the defendant rode the horse away, and never returned; this was holden to be no larceny, because the property, as well as the possession, was parted with. *Rex v. Harvey*, 1 Leach, C. C. 467; 2 East, P. C. 699. So where the defendant bought goods, and desired them to be sent to him with a bill and receipt, and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. *Rex v. Parkes*, 2 Leach, C. C. 614; 2 East, P. C. 671. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawnbroker upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was holden to be no larceny. *Rex v. Jackson*, 1 Moody, C. C. 119. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger upon the credit of the customer; the judges held that this was not larceny, the owner having parted with his property in the hat. *Rex v. Adams*, Russell & Ryan, C. C. 225. So, where a woman obtained from the prosecutor, in the name of one of his neighbors, half a guinea's worth of silver, and said that she would return presently with the half guinea, it was holden not to be larceny, for the same reason. *Rex v. Coleman*, 2 East, P. C. 672. So, where A. allowed B. to take a sovereign away to get change for it, and he never returned, this was held no larceny of the sovereign. *Regina v. Thomas*, 9 Carrington & Payne, 741. So, where

the defendant sent a letter to the prosecutor in the name of another person, requesting a loan of 3*l.* for a few days, and obtained the money accordingly; eleven of the judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery. *Rex v. Atkinson*, 2 East, P. C. 673. So, where the defendant obtained goods of a tradesman by means of a forged order from a customer. *Regina v. Adams*, 1 Denison, C. C. 38. And where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick, one of them won from him the money in question, which he paid, imagining it to have been won fairly; the judges held that this was no larceny, the prosecutor having parted with his property in the money under an idea that it had been fairly won. *Rex v. Nicholson*, 2 Leach, C. C. 610.

Secondly. Where the possession of the goods has been obtained *animus furandi*.

Where a man, having the *animus furandi*, obtains, in pursuance thereof, possession of the goods by some trick or artifice, this is considered such a taking, even although there be a delivery in fact, as to constitute larceny. *The State v. Gorman*, 2 Nott & McCord, 90; *Starkie v. The Commonwealth*, 7 Leigh, 752; *The State v. Thurston*, 2 M'Mullan, 382, 395. See *Feller v. The State*, 9 Yerger, 397. Where the defendant offered to give the prosecutor gold for bank notes, and upon the prosecutor's laying down some bank notes for the purpose of having them changed for gold, the defendant took them up, and went away with them, promising to return immediately with the notes, but never in fact returned; Wood, B., left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes, and said, that if they were of that opinion, the case clearly amounted to larceny. *Rex v. Oliver*, 4 Taunton, 274, cited 2 Leach, C. C. 1072. See *Regina v. Rodway*, 9 Carrington & Payne, 984. Where the defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person

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with him to his lodgings, he would give him the amount, deducting the discount and commission; a person was sent accordingly, but, upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned; the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it; the jury being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the prisoner, and the judges afterwards held the conviction to be right. *Rex v. Aickles*, 2 East, P. C. 675; 1 Leach, C. C. 294. See *Wilson v. The State*, 1 Porter, 118, 126, 127. Where the defendant obtained from a silversmith two cream ewers, in order that the customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not at the time of the delivery intend to charge for either of them until he had ascertained which would be chosen, this was holden by Bayley, J., to be larceny, because the possession only, and not the right of property, had been parted with; *Rex v. Davenport*, MS., 1 Arch. Peel's Acts, 5; but if the prisoner had in fact been sent by the customer to the silversmith, the possession would have been in the prisoner, and the subsequent conversion would not have been larceny; and, upon this ground, in a case similarly circumstanced, but in which there was no evidence that the prisoner had not actually been sent for the goods, Patteson, J., directed an acquittal; for, *non constat* that the prisoner had not been sent for the goods as she had stated, and had delivered them to the person who sent her. *Rex v. Savage*, 5 Carrington & Payne, 143.

Where the defendant prevailed upon a tradesman to take goods to a particular place, under the pretence that the price would then be paid for them, and afterwards induced him to leave the goods in

the care of a third person, from whom the defendant got the goods without paying the price, the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, *ab initio*, intended to get the goods without paying for them; this was holden to be larceny. *Rex v. Campbell*, 1 Moody, C. C. 179. See *Ross v. The People*, 5 Hill, (N. Y.) 294. So, where the defendant induced a tradesman to send his goods by a servant to a particular place, with change for a crown piece, and on the way met the servant, and giving him a counterfeit crown piece, induced him to part with the goods and change, which he had no authority to do without receiving payment; this was holden to be larceny. *Rex v. Small*, 8 Carrington & Payne, 46. So, where the defendant having bargained for goods, for which by the custom of trade, the price should have been paid before they were taken away, took them away without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession, and dispose of them for his own benefit; this was holden to be larceny. *Rex v. Gilbert*, 1 Moody, C. C. 185. And where the defendant, intending *ab initio* to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, this was holden to be larceny. *Rex v. Pratt*, 1 Moody, C. C. 250; *Regina v. Cohen*, 2 Denison, C. C. 249; 5 Eng. Law and Eq. Rep. 545.

So, obtaining money or goods by the practice of ring-dropping (as it is termed) has been holden to be larceny. Thus, where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt for 147*l.* for a "rich brilliant diamond ring," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the

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value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10s. only, and the watch and money were never returned; it was left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion, convicted the defendant. *Rex v. Patch*, 1 Leach, C. C. 238. In *Rex v. Moore*, 1 Leach, C. C. 314; 2 East, P. C. 679, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not. See also *Rex v. Watson*, 2 Leach, C. C. 640; 2 East, P. C. 680. Where the defendant, in the presence of the prosecutor, picked up a purse containing a watch-chain and two seals, which the defendant and his confederate represented to be gold, and worth 18*l.*, and the prosecutor purchased the defendant's share for 7*l.*, intending to part with the property in the money as well as the possession of it; Coleridge, J., held that this was not larceny. *Regina v. Wilson*, 8 Carrington & Payne, 111. Where the defendants decoyed the prosecutor into a public house, and then introduced the play of cutting, and one of them prevailed on the prosecutor, who did not play on his own account, to cut the cards for him; and then, under the pretence that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained; and which would be a felony, should they find that the money was obtained upon a preconcerted plan to steal it. *Rex v. Horner*, 1 Leach, C. C. 270; Caldecott, 295. So, where the prosecutor was induced, by a preconcerted plan, to de-

posit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false color of winning the bet, and the jury found that there was; this was held to be larceny; because, at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party really won the wager. *Rex v. Robson*, Russell & Ryan, C. C. 413.

Where two men, J. and W., acting in concert, and intending to defraud the prosecutor, entered his shop, and by means of an artifice induced him to draw a check on his banker for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to the prosecutor of 42 sovereigns, and that the prisoner W. was to remain at the shop till they went to and returned from the bank; at the bank, by the prosecutor's desire, and in his presence, the banker handed four 10*l.* notes and two sovereigns to the prisoner J.; the prosecutor and J. then left the bank together, and while on their way back to the shop, J. absconded with the notes and the two sovereigns, which he and W., who had in the meantime gone off from the shop, appropriated to their own use; this was held to be a larceny by both prisoners of the notes and the two sovereigns, the prosecutor never having parted with the property in and possession of them, and J. having no more than the bare custody of them until the payment to the prosecutor of the 42 sovereigns. *Regina v. Johnson*, 2 Denison, C. C. 310; 5 Cox, C. C. 372; 14 Eng. Law and Eq. Rep. 570. Where the defendant by false representations induced the prosecutrix to buy from him a dress for 25*s.*, promising that if she would do so he would give her another dress worth 12*s.*; then took a guinea from her

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hand, gave her a dress worth much less than a guinea, and refused to give her the other dress he had promised; this, it being found by the jury that it was part of the defendant's scheme to obtain the money by means of a pretended sale, was held to be larceny. *Regina v. Morgan*, 1 Dearsly, C. C. 395; 6 Cox, C. C. 408; 29 Eng. Law and Eq. Rep. 543. Where the prisoner went into a shop and asked for change for half a crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown; upon an indictment for stealing the two shillings and sixpence, Parke, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *Rex v. Williams*, 6 Carrington & Payne, 390. Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant chose six pairs, which were laid on the back of a chair; the defendant then sent the prosecutor back to his shop for some articles, and while he was absent, absconded with the stockings; the judges held, that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. *Rex v. Sharpless*, 1 Leach, C. C. 93; 2 East, P. C. 675.

Where the defendant hired a horse from the prosecutor, on pretence of taking a journey, and it turned out that, instead of going the journey, he sold the horse in Smithfield market on the same day; it was left to the jury to consider, whether he hired the horse for the purpose of stealing it, or whether he hired it really for the purpose of taking the journey, and afterwards changed his intention; and the jury, being of the former opinion, found him guilty; seven of the judges were afterwards clearly of opinion that the offence was felony. *Rex v. Pear*, 1 Leach, C. C. 212; 2 East, P. C. 685. See *Rex v. Banks*, Russell & Ryan, C. C. 441; post, p. 153. And the same where the defendant hired the horse in the name of another person. *Rex v. Charlewood*, 1 Leach, C.

C. 409; 2 East, P. C. 689. So, where the defendant hired a post-chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it, twelve months afterwards, as for a larceny, it was holden clearly to amount to that offence, although the chaise was not hired for any definite time. *Rex v. Semple*, 1 Leach, C. C. 420; 2 East, P. C. 691.

There must, however, according to the decision of Tindal, C. J., in *Regina v. Brooks*, 8 Carrington & Payne, 295, (1838,) in order to constitute a larceny by a party to whom the goods have been delivered on hire, be not only an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods by a third party, who however did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed, was held not to amount to such a conversion. But this case has recently been overruled. *Regina v. Janson*, 4 Cox, C. C. 82, (1849,) by Coleridge, J., after consulting Parke, B. In *Semple's case*, supra, the subsequent conversion was presumed from the long lapse of time, and the other circumstances of the case, although the chaise was not proved to have been actually disposed of by the defendant. Where the prisoner went to an inn, on a fair-day, and desired the ostler to bring out his horse, and upon the latter saying he did not know which was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare, which the prisoner attempted to mount but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured; Garrow, B., held this to be larceny. *Rex v. Pitman*, 2 Carrington & Payne, 423. If a man, *animo furandi*, sue out a replevin, and by that means obtain the possession of another man's horse, and ride away with it; or by a fraudulent ejectment get possession of another's house, and carry away the goods out of it,

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he is guilty of larceny. 1 Hale, P. C. 507; 1 Hawkins, P. C. ch. 83, § 12; 3 Inst. 108. And see *Rex v. Farr*, Kelyng, 43; 2 Leach, C. C. 1064, n. Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was holden to be larceny; because the servant had no authority to part with the goods but to the right person. *Rex v. Longstreeth*, 1 Moody, C. C. 187. So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendant by fraud induced the servant to part with the possession of the horse, under color of an exchange for another, intending all the while to steal it, this was holden to be larceny. *Regina v. Sheppard*, 9 Carrington & Payne, 121.

Where the defendant, by artifice, obtained possession of a request-note at the India House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor, (to whom he was a perfect stranger,) and the chest of tea was thereupon delivered to him; the judges held this to be larceny, notwithstanding the possession had been obtained by means of a regular request-note and permit. *Rex v. Hench*, Russell & Ryan, C. C. 163. A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered, to Mr. Heath's; the defendant replied, that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return, to take home to his master; the boy accordingly gave him the parcel; but the parcel he took from him for his master contained nothing but old rags, of no value; the judges held this to be larceny. *Rex v. Wilkins*, 1 Leach, C. C. 520; 2 East, P. C. 673. It must be owned that these last two cases so nearly resemble a few of the latter cases collected under the first head, that the reader will probably feel some difficulty in distinguishing them upon principle. They may be considered as very nearly approaching

the boundary which separates the one class of cases from the other. In England, in such cases, it is safer and more prudent to indict the defendant for obtaining goods, etc., by false pretences; by stat. 7 & 8 G. 4, ch. 29, § 53, the punishment is nearly the same as for simple larceny; and if upon an indictment for obtaining goods, etc., by false pretences, it be proved that the defendant obtained the goods, etc., under circumstances which in law amount to larceny, he will not, upon that ground, be entitled to an acquittal.

Thirdly. As to the case where the possession of the goods has been obtained *bonâ fide*, without any fraudulent intention in the first instance.

Where goods are delivered to a man upon trust, or taken by him with the owner's consent, he is not guilty of larceny by converting them to his own use. Even if the goods of a husband be taken with the consent or privity of the wife, it is not larceny. *Rex v. Harrison*, 1 Leach, C. C. 47. But this principle is qualified by this, that when the wife becomes an adulteress, she determines her quality of wife, and her property in the husband's goods is not recognized. For a discussion of this rule, see *Regina v. Featherstone*, and note, *ante*, Vol. 1, p. 199.

Where the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession; the jury finding that she took them originally merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention till afterwards, the judges held that it was a mere breach of trust, and not a felony. *Rex v. Leigh*, 2 East, P. C. 694. See *Regina v. Riley*, post, p. 155. So, where a letter directed to J. M., St. Martin's Lane, Birmingham, inclosing a bill of exchange drawn in favor of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's Lane, Birmingham; but in truth the letter was intended for a person of the name of J. M., who resided in New Hall Street; and the pri-

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owner, who from the contents of the letter must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because, at the time when the letter was delivered to him, the defendant had not the *animus furandi*. *Rez v. Mucklow*, 1 Moody, C. C. 160. See *Regina v. Davis*, 7 Cox, C. C. 104. If A. lend B. a horse, and he ride away with him, or if I send goods by a carrier, and he carry them away; or if any other bailee convert the goods bailed to his own use, it is not larceny; because the original taking was *bonâ fide*, and without fraud. 1 Hale, P. C. 504; 1 Hawkins, P. C. ch. 38, § 2. So, if A. *bonâ fide* hire a horse for a particular purpose, and, after that purpose is accomplished, sell the horse, it is no larceny; for, unless he had an original felonious intention, the subsequent withholding or disposing of the horse does not constitute a new felonious taking. *Rez v. Banks*, Russell & Ryan, C. C. 441, overruling *Rez v. Tunnard*, 2 East, P. C. 687. So, if A. deliver to B. a watch to be repaired, and B. sell it, it is not larceny, because it was delivered voluntarily, and not obtained *animus furandi*. *Rez v. Levy*, 4 Carrington & Payne, 241; *Regina v. Thistle*, 1 Denison, C. C. 502; 2 Carrington & Kirwan, 842; Temple & Mew, C. C. 204. So, if A. deliver to B. a horse to be agisted, and B. sell it, this is no larceny. *Rez v. C. Smith*, 1 Moody, C. C. 473. So, where a letter-carrier between A. and B. was entrusted at A. with a directed envelope and a 5*l.* note, to deliver to the postmaster at B., in order that he might make out a money order for 5*l.* and send it in the envelope according to the direction, and on the road the defendant appropriated the note, this was held not to be larceny, the jury finding that he had no intention of stealing the note when it was given to him at A. *Regina v. Glass*, 1 Denison, C. C. 215; 2 Carrington & Kirwan, 395. So, where the defendant had assigned his goods by deed to trustees for the benefit of his creditors, re-

maining in actual possession thereof, and he removed them in order to deprive the creditors of them; for he was in lawful possession of them notwithstanding the assignment. *Regina v. Pratt*, 1 Dearsly. C. C. 360; 6 Cox, C. C. 373; 26 Eng. Law and Eq. Rep. 574.

But this rule can only obtain in cases in which the possession is obtained *bonâ fide* in the first instance; for if A. obtain goods *animus furandi*, or receive them, harboring at the time an intention wrongfully to convert them to his own use, it is larceny. Thus, where the defendant was employed to drive sheep to a fair, but, instead of driving them to the fair, he drove them in a contrary direction, and sold ten of them on the morning he received them; the jury were of opinion, that, at the time he received them, he intended to convert them to his own use; this was holden to be larceny. *Rez v. Stock*, 1 Moody, C. C. 87; *The State v. Thurston*, 2 M'Mullan, 382, 395, 396. See *Rez v. M'Namee*, 1 Moody, C. C. 368; *Regina v. Goodbody*, 8 Carrington & Payne, 665; *Regina v. Harvey*, 9 Carrington & Payne, 353; *Regina v. Evans*, Carrington & Marshman, 632. See *Regina v. Hey*, 1 Denison, C. C. 601; 2 Carrington & Kirwan, 983; post, p. 156.

The rule also applies only while the contract of bailment continues; for if that be determined, and the conversion take place afterwards, it will amount to larceny. As, for instance, if a carrier take goods to the place appointed, and afterwards take them away and convert them, it will amount to larceny. 3 Inst. 107. See *Regina v. Stear*, 1 Denison, C. C. 349; 2 Carrington & Kirwan, 988; Temple & Mew, C. C. 11. So, the contract may be determined before its regular completion, by the tortious act of the bailee. Thus, if a carrier open a bale or pack of goods, or pierce a vessel of wine and take away *part* thereof, he is guilty of larceny; 3 Inst. 107; 1 Hale, P. C. 105; for by this tortious act the contract of bailment is determined.¹ Id.; and see Kelyng, 82, 83.

¹ But if he sells the *entire* package, in its original state, without any other act, although the *privy* of contract is thereby determined, he is not guilty of larceny. This distinction,

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Where forty bags of wheat were sent, for safe custody, to a warehouseman, who emptied several of the sacks, sold the wheat, and substituted other wheat of inferior quality, the judges were unanimously of opinion, that the taking of the whole of the wheat out of one sack was as much a larceny as the taking a part merely. *Rez v. Brazier*, Russell & Ryan, C. C. 337. And where a servant of a common carrier, who was entrusted with several packages to be carried, abstracted an entire package, this was held to amount to a breaking of bulk sufficient to determine the bailment, and to constitute larceny. *Commonwealth v. Brown*, 4 Massachusetts, 580. See *Dame v. Baldwin*, 8 Massachusetts, 518. Where a captain, in whose ship several casks of butter were stowed, the principal number being in the hold battened down, but some were on deck, being driven into port by stress of weather,

sold, as his own, some of the casks which were on deck, and, upon arriving at his destination, told the consignee that the casks had been thrown overboard, the judges held this to be no larceny; but it seemed to be admitted, that if the defendant had broken bulk by taking the casks from the hold, it would have been otherwise. *Rez v. Madox*, Russell & Ryan, C. C. 92. So where the defendant, a carrier, was employed by the prosecutor to carry a cargo of coals from a ship to a coal-yard, and thence to another yard belonging to the prosecutor; and the defendant carted the coals to the first-mentioned yard, and was engaged several days in carting them from thence to the prosecutor's yard, in the course of which he fraudulently misdelivered two cart-loads of them, it was holden that he could not be convicted of larceny, there being no breaking of bulk or other determination

although at first it appears absurd, is well settled, and not now to be questioned. In Starkie on Evidence, (Vol. 3, p. 448, note,) this principle is thus stated in the usual lucid and elegant style of that author. "The distinction which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may, at first sight, appear somewhat paradoxical and unreasonable, that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be well warranted, when it is considered how necessary it is to preserve the limits which separate the offence of larceny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit; and that the distinction results from a strict application of the rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, so would every other bailee or trustee, and the offence of larceny would be confounded with that of a mere breach of trust, and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larceny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier, being inconsistent with the object of the bailment, determines the privity of contract; but then the question arises, what caption and asportation constitute the larceny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient; and the act of conversion itself, such as the delivery of the whole of the entire package to a purchaser, is insufficient, because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or, as it seems, of the whole of the goods, is a complete larceny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated. 1 Hale, P. C. 504, 505; 2 East, P. C. 697. Kelyng, C. J., explains it upon the ground of a presumed previous felonious intention on the part of a carrier, when he first took the goods; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package." And see *Lewer v. The Commonwealth*, 15 Sergeant & Rawle, 93, 97.

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of the bailment. *Regina v. Cornish*, 1 Dearsly, C. C. 425; 6 Cox, C. C. 432; 33 Eng. Law and Eq. Rep. 527. A., the owner of a boat, was employed by B., the captain of a ship, to carry a number of staves ashore in his boat; but B.'s men were put in the boat, but were under the control of A., who did not deliver all the staves, but carried one to the house of his mother, and it was held by Patteson, J., that this amounted to a bailment to A., so as to excuse him of the larceny if he had not delivered any of the staves, but that the separation of one staff with intent to convert it to his own use was a breaking of bulk, and so amounted to larceny. *Rex v. Howell*, 7 Carrington & Payne, 325. So, where a person, not being the servant of the prosecutor, received from him a parcel containing notes, to take to a coach-office, and on the way he abstracted the notes, and applied them to his own use, he was holden guilty of larceny. *Regina v. Jenkins*, 9 Carrington & Payne, 88. So, where a person entrusted with a parcel of clothes for sale, the price being fixed to each, pawned some, and fraudulently appropriated the rest, such appropriation was held to be larceny. *Regina v. Poyser*, 2 Denison, C. C. 233; 5 Cox, C. C. 241; 4 Eng. Law and Eq. Rep. 565. If he who is employed to carry goods for hire, appropriate them to his own use without breaking bulk, it is no larceny, even though he be not a common carrier, but be employed in the particular instance only. *Rex v. Fletcher*, 4 Carrington & Payne, 545; *Rex v. Pralley*, 5 Carrington & Payne, 533. It must be carefully observed, however, that the rule which we have now been considering, applies only where the goods were in the first instance obtained *rightfully* as well as without the *animus furandi*. For even though they were obtained in the first instance without a *felonious* intent, yet if the possession of them was obtained by a *trespass*, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, will be a larceny. As where a man driving a flock of sheep from a field, drove with them a sheep belonging to another person, without knowing that he had

done so, but afterwards, when he discovered the fact, sold that sheep and appropriated the proceeds of the sale to his own use, he was held to be convicted rightly of larceny. *Regina v. Riley*, 1 Dearsly, C. C. 149; 14 Eng. Law and Eq. Rep. 545; 6 Cox, C. C. 88.

Fourthly. As to cases, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him.

If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law; 1 Hale, P. C. 506; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. *The People v. Call*, 1 Denio, 120; *The State v. Self*, 1 Bay, 242; *The United States v. Clew*, 4 Washington, 700. Where a person employed to drive cattle, or to take them to a particular place for a special purpose, and bring them back, sells them, it is larceny; for he has the custody merely, and not the right to the possession; *Rex v. M'Namee*, 1 Moody, C. C. 361; although the intention to convert them was not conceived until after they were delivered to him. *Regina v. Harvey*, 9 Carrington & Payne, 353; *Regina v. Jackson*, 2 Moody, C. C. 32. See *Regina v. Goode*, Carrington & Marshman, 582; *Regina v. C. Jones*, Id. 611; *Regina v. Francis Smith*, 1 Carrington & Kirwan, 423. Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, it was holden to be felony. *Rex v. Robinson*, 2 East, P. C. 565. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them, the judges held this to be felony. *Rex v. Bass*, 2 East, P. C. 566. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the daytime, received from his master a bill of exchange, with directions to send it inclosed in a letter to J. S. in London;

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the defendant absconded with the bill; and the judges held this to be felony. *Rex v. Paradise*, 2 East, P. C. 565. So, if money, or a valuable security, (as a cheque drawn by the prosecutor on a banker, *Regina v. Heath*, 2 Moody, C. C. 33,) be given by a master to his servant to carry to another, or to purchase goods with, and the servant apply it to his own use, it is larceny. *Rex v. Lavender*, 2 Russell, Crim. Law, (3d ed.) 160; *Regina v. Beaman*, Carrington & Marshman, 595. So, if a man having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman embezzle a part of it, this is larceny. *Rex v. Abrahams*, 2 Leach, C. C. 824; *Rex v. Spear*, 2 Leach, C. C. 825; 2 East, P. C. 568. So, where the servant of a master carman, employed to cart goods, by collusion with others suffered the goods, with the cart, to be taken away, it was holden to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner. *Rex v. Harding*, Russell & Ryan, C. C. 125. So, where a servant got ten guineas from her master, in order to get silver for them, and instead of doing so, ran away with the guineas, it was holden to be larceny. *Rex v. Atkinson*, 1 Leach, C. C. 302. Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange, unindorsed, got it discounted, and absconded with the produce of it, it was holden to be felony. *Rex v. Chipchase*, 2 Leach, C. C. 699; and see *Rex v. Murray*, 1 Leach, C. C. 344. Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank-notes, entering the payment in the book as being made to "a man;" this was holden by the judges to be a larceny of the bank-notes. *Rex v. Hammon*, Russell & Ryan, C. C. 221; 2 Leach, C. C. 1083; 4 Taunton, 304. So,

if a sheriff's officer clandestinely sell, for his own use, part of the goods which he has seized under a *fi. fa.*, he is guilty of larceny, because he has the custody of the goods merely, like a servant, and has not the legal possession. *Rex v. Eastall*, 2 Russell, Crim. Law, (3d ed.) 153. But where A. employed B., who was by business a drover, to drive pigs and deliver them to C. at L. he was to be paid by the day, but, by the usage of the trade, he had a right to drive other persons' pigs to L. along with A.'s, if he chose; he drove the pigs to L., and, as C.'s wife would not receive them, he took them to L. market, sold them, and absconded; this was held no larceny, as under the circumstances B. was a bailee and not a servant, and he had no original intention of stealing the pigs. *Regina v. Hey*, 1 Denison, C. C. 602; 2 Carrington & Kirwan, 983; Temple & Mew, C. C. 209, doubting *Rex v. McNamee*, 1 Moody, C. C. 368. See *Regina v. Gibbs*, 1 Dearsly, C. C. 445; 29 Eng. Law and Eq. Rep. 538; 6 Cox, C. C. 455.

An unauthorized gift by the servant of his master's goods is as much a felony as if he sold or pawned them. *Regina v. White*, 9 Carrington & Payne, 344. And where a third party receives goods from a servant, under color of a pretended sale, knowing that the servant has no authority to sell them, and is in fact defrauding his master, this is larceny in both. *Regina v. Hornby*, 1 Carrington & Kirwan, 305.

But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this is holden to be no larceny at common law. *Commonwealth v. King*, 9 Cushing, 284; 2 East, P. C. 568. Therefore, if a shopman receive money from a customer of his master, and, instead of putting it into the till, secretes it; *Rex v. Bull*, 2 Leach, C. C. 841, cited; or, if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, purloin it; *Rex v. Bazeley*, 2 Leach, C. C. 835; or receive a bond for the purpose of being deposited in the bank, and instead

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of depositing it, convert it to his own use; *Rex v. Waile*, 1 Leach, C. C. 28; 2 East, P. C. 570; in these cases, it has been holden, that the clerk or shopman is not guilty of larceny. So, where a servant was sent by his master to get silver for a 5*l.* note, which he did, and absconded with the silver, it was holden no larceny, because the silver had never been in the possession of his master, except by the hands of the servant. *Rex v. Sullens*, 1 Moody, C. C. 129. And where the prosecutor, having employed the defendant to purchase Exchequer bills for him, gave him a cheque upon his bankers for the amount, and the defendant received the amount of the cheque in bank-notes, and absconded, it was holden not to amount to a larceny of the notes, because the prosecutor never had possession of them except by the hands of the defendant. *Rex v. Walsh*, Russell & Ryan, C. C. 218; *Commonwealth v. King*, 9 Cushing, 284. What is a sufficient delivery to the master for this purpose must depend upon the nature of the goods. Thus, the putting down, by the servant, of a load of hay, which the master had sent him for, at the master's stable door, was held a sufficient delivery to the master to make the servant guilty of larceny in then appropriating a part of it to his own use. *Regina v. Hayward*, 1 Carrington & Kirwan, 508. There is a distinction between servants and bailees, noticed in the text, which it may be necessary to mention in this place; if, for instance, a weaver or silk throwster deliver yarn or silk to be wrought by his journeymen in his house, and they carry it away, and convert it to their own use, this is larceny; but if to be wrought out of the house, it is not; for the journeymen in that case are considered bailees, not servants. See 2 East, P. C. 682, 683.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the

possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them make away with them and convert them to his own use, he will be guilty of larceny. 2 East, P. C. 683, 684; 1 Hawkins, P. C. ch. 33, § 2. As, for instance, if the owner give the goods to a man to carry, and accompany him at the same time, if the man run away with the goods, he is clearly guilty of larceny. So, if a man have a bare use of the goods of another, this does not divest the owner of the possession in law; and if the person who thus has the use of them, fraudulently convert them, it is larceny. As, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 Hale, P. C. 506; 1 Hawkins, P. C. ch. 33, § 6.

It may be necessary to add, that although the taking must, in strictness, be *invito domino*, yet, where a servant, being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come; it was holden that this conduct of the master was no defence to an indictment against the robbers. *Rex v. Eggington*, 2 Bosanquet & Puller, 508; 2 Leach, C. C. 913. See *Rex v. Williams*, 1 Carrington & Kirwan, 195.

This note is reprinted with alterations and additions from the thirteenth London edition of Archbold's standard Treatise on Pleading and Evidence in Criminal Cases. In this edition, the English cases are brought down to the time of publication, March, 1856, and it contains not only the latest, but the clearest and most accurate statement of the nice and delicate distinctions of this part of the law of larceny, extant.

H.

Evidence — Character.

COMMONWEALTH v. HARDY.¹

March Term, 1807.

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In capital trials, the prisoner may give his general character in evidence, after which the prosecutor may call witnesses to disprove such testimony.

At the trial of Hardy, the prisoner's counsel offered some evidence as to his general character. The Solicitor-General objected to its being received, on the ground that it had been heretofore uniformly rejected upon criminal trials in this State. The prisoner's counsel urged that such testimony was calculated to have *great weight* with a jury in all doubtful cases, whether the doubt arises from the nature of the testimony, or from the character of the witnesses for the prosecution. If such testimony is rejected, it follows that a man's good name will cease to be of value to him, in a case in which it ought to be inestimable. It is now the practice of the English courts to admit testimony of general character to be offered by every person on trial, even for a misdemeanor. Surely it is proper that the practice here should be changed, at least in cases where the life of a citizen is in question.

The court unanimously admitted the evidence.

PARSONS, C. J., said that he was of opinion that a prisoner ought to be permitted to give in evidence his general character in all cases; for he did not see why it should be evidence in a capital case, and not in cases of an inferior degree. In doubtful cases, a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts.

SEWALL and PARKER, Justices, said that they were not prepared to

¹ 2 Massachusetts, 317.

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say that testimony of general character should be admitted in behalf of the defendant in all criminal prosecutions; but they were clearly of opinion that it might be admitted in capital cases, in favor of life.

Evidence of the general character of the prisoner, or of the party on whom the crime is alleged to have been committed, is tendered for the purpose of raising a presumption of innocence or guilt. Formerly, evidence of the prisoner's good character was held to be admissible, *in favorem vitæ*, in capital cases only. *Rez v. Harris*, 2 State Trials, 1038. And see the text, *per* Sewall and Parkér, Justices. But at the present day, such evidence is admitted in all criminal prosecutions. "I cannot, in principle," said Mr. Justice Patteson, "make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case." *Rez v. Stannard*, 7 Carrington & Payne, 673. And see the opinion of Chief Justice Parsons, in the text.

But this species of evidence is confined exclusively to criminal proceedings; and so strict is the rule, that on the trial of an information, filed in the Exchequer by the Attorney-General, for keeping false weights, and for offering to corrupt an officer, this evidence was rejected by Chief Baron Eyre, who said: "It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime such evidence is admissible, but where the prosecution is not directly for the crime, but for the penalty, as in this information, it is not." *The Attorney-General v. Bowman*, 2 Bosanquet & Fuller, 532, note, (1791.) See *Thayer v. Boyle*, 30 Maine, 475, 480. In a very recent case, *The Attorney-General v. Radloff*, 10 Exchequer Rep. 84; 26

Eng. Law & Eq. Rep. 416, (1854,) which was a proceeding in the Court of Exchequer, on the part of the Attorney-General, to recover penalties by means of an information, Martin, B., said: "The proper meaning of 'crime' is an indictable offence. The question has frequently arisen, whether an information at the suit of the Attorney-General, for penalties for smuggling, be a criminal proceeding. I believe it has invariably been considered not to be so. One test, and a very obvious one, is, whether, in such a case, the character of the defendant be admissible in evidence. It has been decided that it is not. In criminal cases, evidence of the good character of the accused is most properly, and with good reason, admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime; but, in civil cases, such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present, and the reason given is, (as indeed it must be,) that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that, therefore, the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed."

When the point at issue is, whether the accused has committed a particular act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and therefore, in this event alone, will the jury be advised to act upon such evidence. 1 Starkie on Ev. (London ed. 1853,) 75. Thus, in *The State v. Wells*, Cox, 429, Kinsey, C. J., said: "The

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defendant has an unquestionable right to adduce testimony tending to show his general good and pacific character, and to let it have what weight it may be entitled to with the jury. Still, if evidence of this kind is admitted, I should think it my duty to inform the jury that it should receive little attention in any case, unless where the fact is itself dubious, or where the charge rests altogether upon presumptive testimony. Against the positive declarations of positive witnesses, it ought not to be permitted to weigh." See *The United States v. Rondenbush*, Baldwin, 514; *McDaniel v. The State*, 8 Smedes & Marshall, 401; *The State v. Schaller*, 14 Missouri, 502.

The inquiry must be confined, except where the intention forms a material ingredient in the offence, to the general character of the prisoner, and must not condescend to particular facts; for although the common reputation in which a person is held in society may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or cruel act. But the mere proof of isolated facts can afford no such presumption. 1 Taylor on Ev. § 258. And see *Rex v. Davison*, 31 Howell's State Trials, 187, 217, per Lord Ellenborough. Evidence of character must, of course, be applicable to the nature of the charge; for instance, to prove that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty. Wills on Cir. Ev. p. 131.

Although the defendant is allowed to introduce this kind of testimony, the prosecutor cannot, in the first instance, have recourse to the same loose testimony, as the means of establishing the guilt of the

accused; but if, with the view of raising a presumption of innocence,¹ witnesses to character are called for the defence, the counsel for the government may then give evidence to rebut and counteract this presumption. 1 Taylor on Ev. § 259; *Commonwealth v. Webster*, 5 Cushing, 525; *The People v. White*, 14 Wendell, 111; *Bennett v. The State*, 8 Humphreys, 118. And if the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent for the government to prove that, subsequently to that time, his character had been bad. *Commonwealth v. Sackett*, 22 Pickering, 394. Per Curiam: "The defendant having put his character in issue, it was competent for the government to prove that it was not good; but his counsel contend that the inquiries should have been confined to the period anterior to the supposed commission of the offence charged. We are not aware of any rule to that effect. Evidence of a bad reputation, subsequently acquired, may indeed be of little weight, but still it will have some bearing, as, commonly, the descent from virtue to crime is gradual. We decide that such evidence is competent, but it is to be received with great caution." And see *Carter v. The Commonwealth*, 2 Virginia Cases, 169; *The State v. Merrill*, 2 Devereux, 269; *The State v. Upham*, 38 Maine, 261, 263. But in a very recent case in England, Martin, B., after consulting with Erle, J., refused to allow the counsel for the prosecution to give evidence of the prisoner's general bad character, after a witness had given evidence of the prisoner's good character. *Regina v. Burt*, 5 Cox, C. C. 284, (1851.) Erle, J., said he had never known such a course pursued.

In *Commonwealth v. Webster*, 5 Cushing, 324, Chief Justice Shaw, with reference to this kind of evidence, charged the jury as follows: "There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is

¹ And for this purpose evidence must be adduced; the general presumption of innocence is not sufficient. *The State v. Ford*, 3 Strobhart, 517, note.

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nearly balanced, in which a good character may be very important to a man's defence. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny, or other lesser crime. He may show that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like this of murder to prove a high character, and, by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character."

● In *The State v. McAllister*, 24 Maine, 139, (1844,) it was decided, that if a defendant offers no evidence of good character, the prosecutor is at liberty to raise an inference, in an argument to the jury, of the guilt of the defendant, or of his bad character. But this decision, which is contrary to every feeling of humanity, to say nothing of principle, has been expressly overruled. *The State v. Upham*, 38 Maine, 261, (1854.) In this case, the case of *Ackley v. The State*, 9 Barbour, 609, was cited and sustained. In delivering the opinion of the court, Hathaway, J., said: "The prosecutor cannot be permitted to offer testimony concerning the prisoner's character, unless the prisoner enable him to do so by introducing testimony in support of it. 2 Russell on Crimes, 704; 3 Greenleaf's Ev. § 25. Where, upon the trial of an indictment, no proof as to the general character of the person is given, the law presumes that it is of ordinary fairness. If he choose to give no evidence upon the subject, the jury is not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. *Ackley v. The People*, 9 Barbour, 609. The rulings of the presiding judge in this matter cannot be sustained, either upon principle or authority. The defendant might well repose upon the legal presumption of his innocence, without apprehending that he incurred the danger of furnishing the basis for an argument against him, by neglecting or declining to introduce witnesses to prove his character good, when the law presumed it to be so." And see acc. *The People v. Bodine*, 1 Denio, 281, 314; *The State v. O'Neal*, 7 Iredell, 251.

In regard to the character of the person on whom the offence was committed, no evidence is in general admissible, the character being no part of the *res gestæ*. Thus, where evidence was offered to prove that the person killed was in the habit of drinking to excess, and that drinking made him exceedingly quarrelsome, savage, and dangerous, and, when intoxicated, he frequently threatened the lives of his wife and others, whom the prisoner had more

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than once been called upon to protect against his fury, all which was matter of common notoriety; it was held rightly rejected, as having no connection with what took place at the time of the homicide. *The State v. Field*, 14 Maine, 244. In *Commonwealth v. York*, 7 The Law Reporter, 507, before Shaw, C. J., and Wilde and Hubbard, Justices, the counsel for the prisoner asked leave to introduce evidence to the effect, that the deceased was "a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter." Shaw, C. J., said: "The general rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestæ*. The only exception is in the case of a rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In *Regina v. Smith*, 8 Carrington & Payne, 168, the expression probably arose from boasts made by the deceased, and proved as parts of the *res gestæ*. The cases of *The State v. Tackett*, 1 Hawks, 210, and *Quesenberry v. The State*, 3 Stewart & Porter, 308, stand alone, and are not of such authority as to require us to leave the established course of practice."

In *Commonwealth v. Hilliard*, 2 Gray, 294, the counsel for the defendant offered evidence, that "the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man, of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm." By the Court: "The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the Commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncer-

tain to have any legitimate bearing on the question at issue. The provocation under which the deceased acted must be judged of by the *res gestæ*; and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant." And see *The State v. Thawley*, 4 Harrington, 562; *Monroe v. The State*, 5 Georgia, 85; *The State v. Barfield*, 8 Iredell, 344; *The State v. Tilly*, 3 Iredell, 424; *Wright v. The State*, 9 Yerger, 342; *Commonwealth v. Hopkins*, 2 Dana, 418; *Pritchett v. The State*, 22 Alabama, 39.

On a charge of murder, expressions of good will and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes. 1 Phillips on Ev. (London ed. 1843,) 470.

The Law of Scotland is stated as follows, in Alison's Practice of the Criminal Law, p. 629: "Evidence as to character is of weight in a doubtful case, and is always competent; and in cases of homicide, assault, rape, or the like, the pannel may lead evidence as to the temper of the injured party. Common sense demonstrates, that in all cases where the scales of evidence hang at all even, proof of character must be of considerable weight; because it is far more unlikely that a person of good character would commit a disgraceful offence than one of abandoned or dissolute habits. For these reasons, our practice uniformly admits a proof of good character on the prisoner's part, although it only allows, in very special cases, evidence of bad character to be led by the prosecutor, and that only when it specially has reference to the charge in hand, as habit and repute to one of theft, or previous conviction to any offence. The rule of evidence is still stricter; the prosecutor is never allowed to refer to the proved bad character of the prisoner, as heightening the probability that he has been guilty of any particular criminal action; while the prisoner is always allowed

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to refer to the character he has established, if favorable, as casting the balance in his favor in a doubtful case. From its very nature, however, such proof of character can be available only in doubtful cases. If the facts of the libel are clearly established, and the felonious intent is evident, — as if the stolen goods are found in his custody, and he is identified as the thief by the person from whom they were taken, — it is obviously in vain for him to refer to his general character, as rendering it unlikely that he committed that proved offence. But in cases of a more doubtful complexion, — as where there is a doubt as to the veracity of the prosecutor's witnesses, — proof of character often interferes with decisive effect in the prisoner's favor. This is in an especial manner the case in all those instances where the facts are proved or admitted, and the question is *quo animo* they were committed; as if stolen goods are found in his custody, or money suspected to be embezzled is traced into his possession. Honesty and integrity of character are of the greatest moment in all such cases, in supporting any account which he may be able to give, as to the innocent or unintentional possession of such articles. In cases of assault or homicide *in rixa*, the character of the prisoner as a man of an easy temperament, not likely to be ruffled or put into a passion, is obviously of great importance in determining the question, often involved in obscurity, by whom the

affray was commenced, or who was most to blame during the progress. Such proof, accordingly, is clearly competent, and has been frequently admitted in practice. For the same reason, the pannel's former acts of aggression, if violent and repeated, and especially if recent, are just grounds of presumption against him, as they show the true character, the *quo animo* of the fatal blow. Such matters, accordingly, may always be proved by the prosecutor *de recenti*, and even for a remote period, if libelled on under the name of previous malice; and in every case, if the pannel begins to cross-examine, or point to evidence as to his peaceable character, the prosecutor, till his proof is closed, may rebut it by contrary evidence. Sometimes a proof of the character of the party injured is competent, in relation to the matter libelled. Thus, in assaults or homicides *in rixa*, proof of his quiet, peaceable temper, is competent, and has been frequently admitted. In cases of rape, also, the character of the woman may competently be inquired into, as it enters into the essence of the question whether the connection was forced or voluntary. In several cases such proof has been admitted, both of general loose behavior and specific acts of impropriety, though at the distance of years before; and they enter so deeply into the essence of the case, that their relevancy and competency can never be the subject of dispute."

H.

 Confessions.

REGINA v. BALDRY.¹

April 24, 1852.

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A police constable, who apprehended a man on a charge of murder, having told him the nature of the charge against him, said "he need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him." The prisoner thereupon made a confession. *Held*, that the confession was rightly admitted in evidence. *Rex v. Drew*, 8 Carrington & Payne, 140; *Rex v. Morton*, 2 Moody & Robinson, 514; *Regina v. Furley*, 1 Cox, C. C. 76; and *Regina v. Harris*, *Ibid.* 106, are overruled.

AT the Spring Assizes for the county of Suffolk, the prisoner was tried before LORD CAMPBELL, C. J., upon an indictment charging him with having administered poison to his wife, with intent to murder her.

On the part of the prosecution, a police constable was called, whose evidence thus began: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say any thing to criminate himself; what he did say would be taken down and used as evidence against him.*"

Objection was made, on behalf of the prisoner, that what he then said was not admissible.

The Lord Chief Justice thought that, although the caution of the constable differed from that directed by 11 & 12 Vict. ch. 42, § 18, to be given by the justice to the prisoner in the word "will," instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could have no tendency to induce him to say any thing untrue; and that, in spite of it, if he did afterwards confess, the confession must be considered voluntary. His lordship therefore allowed the witness to give in evidence what the prisoner then said, which amounted to a confession of his guilt.

But as doubts had been entertained by learned judges, whether a confession, after such a caution, might lawfully be given in evidence, his lordship reserved the question for the Court of Criminal Appeal.

The prisoner was convicted, and sentence of death was passed upon him.

¹ 2 Denison, C. C. 430; 5 Cox, C. C. 523; 12 Eng. Law and Eq. Rep. 590.

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On the 24th April, A. D. 1852, this case was argued before LORD CAMPBELL, C. J., POLLOCK, C. B., PARKE, B., ERLE, J., and WILLIAMS, J.

H. Mills, for the prisoner. It is proposed, on behalf of the prisoner, to substantiate the objection raised at the trial; and the question is, whether the words addressed by the constable to the prisoner held out to him the promise or assurance of any worldly advantage to himself, in regard to the charge, as the consequence of making a statement, or a threat of harm to himself, as the consequence of refraining from doing so; if so, a confession made on the strength of these words would be inadmissible in evidence.

LORD CAMPBELL, C. J. That is the question.

Mills. If made in consequence of such an inducement, it may be a false charge, made by the prisoner against himself, and unworthy of judicial notice. It is said in 2 Russell on Crimes, 826, that a confession, in order to be admissible, must be "free and voluntary;" that is, it must not be extracted by *any sort* of threat or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence. The ground on which it is supposed to be unworthy of credit is stated by Eyre, C. J., *Warickshall's case*, 1 Leach, C. C. (4th ed.) 263. There is another proposition, also, laid down in Russell. "The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner; and, therefore, excludes the declaration if *any* degree of influence has been exerted." It is gathered from this, that if any inducement, of the slightest description, whereby any worldly advantage to himself, as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue.

POLLOCK, C. B. You are overstating it. The law does not presume that it is untrue; but rather that it is uncertain whether a statement so made is true.

LORD CAMPBELL, C. J. I doubt whether the rule excluding confessions made in consequence of an inducement held out, proceeds upon the presumption that the confession is untrue; but rather that it would be dangerous to receive such evidence, and that, for the due administration of justice, it is better that it should be withdrawn from the consideration of the jury.

Mills. The law assumes that a man may falsely accuse himself

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upon the slightest inducement. In *Cass's case*, 1 Leach, C. C. 293, note, and 1 Den. C. C. 329, a confession induced by saying, "I am in great distress about my irons; if you will tell where they are, I will be favorable to you," was held by Gould, J., to be inadmissible. The slightest hope of mercy, to induce a prisoner to disclose, is enough to render the statement inadmissible. *Rex v. Thomas*, 6 Car. & P. 353, a case before Patteson, J. So, also, in a case of murder before the same learned judge, *Sherrington's case*, 2 Lewin, C. C. 123, where the words were, "No doubt thou wilt be found guilty, it will be better for you if you will confess," the confession was excluded. In another case of murder, *Rex v. Pulley*, 5 Car. & P. 539, the words, "You had better tell the truth, or it will lie upon you and the man go free," were held to be such an inducement as excluded the confession.

POLLOCK, C. B. There is no doubt as to the application of the rule in those cases, which are all familiar to the judges and to the bar.

Mills. They are cited for the purpose of showing how the whole law is imbued with the proposition, that any inducement will exclude a confession. The law will not measure the force of the inducement; and the law supposes that there are circumstances in which a man will make a false accusation against himself. In the case of *Regina v. Garner*, 2 Car. & K. 920, and 1 Den. C. C. 329, the words, "It will be better to speak the truth," were held to operate in exclusion of the confession. The law says, that if any person (being a person of authority) holds out any thing in the nature of an inducement to a prisoner, it will not permit what he has said under the influence of it to be given in evidence. In the case of *Rex v. Parratt*, 4 Car. & P. 570, the prisoner's confession was excluded in consequence of the following threat, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face." There is also a MS. case, 2 Russell on Crimes, 832, *Rex v. Williams*, Gloucester Spring Assizes, 1832, where the prisoner, being in custody on a charge of arson, was told, "That he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed," on which he made a statement. Taunton, J., doubted whether the words used might not be construed as a threat, and, having consulted Littledale, J., said: "We think, as the words were so ambiguous, that they might be considered by the prisoner as a threat, the evidence ought not to be given." Even impressing a man with the fact that the prosecutors

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are sure of his guilt, and alarming him so as to make him throw himself on their unpromised mercy, is sufficient to exclude a confession. In the case of *Rex v. Mills*, 6 Car. & P. 146, Gurney, B., held that the words, "It is of no use for you to deny it, for there is a man and a boy will swear they saw you do it," rendered the prisoner's statement inadmissible. There is also a case before Parke, B., *Regina v. Warringham*, 15 Jurist, 318, where the words, "It is of no use for you to deny it," were held to exclude the confession; but the answers of the witness were confused and contradictory as to whether this language was used by him before or after the confession.

PARKE, B. I have sent for my notes of that case.¹

¹ This case, deciding an important point of evidence, is here inserted in a corrected form. The evidence is taken from the MS. Notes of Baron Parke, who has kindly permitted the Editor to use them, and is included within brackets; the arguments stand as in the original report.

REGINA v. WARRINGHAM.

Surrey Spring Assizes, 1851.

Coram PARKE, B.

In order to render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement; if this appear doubtful on the evidence, the confession ought to be rejected.

On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible.

THE prisoner was indicted for stealing a quantity of brown duck, the property of two persons carrying on business in partnership, in whose shop he served. The first witness was one of the prosecutors.

[Luke Blakemore. Waterproof clothes manufacturer in Tooley Street. My brother is in partnership. Prisoner was in my employ 24th January. In evening, he had charge of the goods in the shop. On the 11th March, I missed a piece of duck, thirty-six yards in length, worth 14s., (it was taken 25th February.) I accused prisoner, and he made no answer. I went to the station-house; I heard something then spoke to prisoner again. I said, *it is of no use to deny*; I have seen the piece of goods at the station-house. He said, he would not have done it if he had not been persuaded to it. I told him, *it would be best for him* if he would tell how it was transacted — this not till some time after. I did not say I would not prosecute him; I did not say he should not lose his situation. My brother was present; he did not say any thing.

Cross-examined. I have not been in Horsemonger Gaol; never in any prison; never had a key turned on me for a day. I was taken to a police station, for selling cherries, a night. It was because I would not move on. I got out at twelve; I was let off. I decline to answer the question as to another time. I was not locked up more than twice. I was not punished. I do not recollect what it was for; three years ago,

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Mills. The law is suspicious, in the highest degree, of confessions; it suspects that it does not get at the truth as to the way in

for the cherries; the other, six or seven years ago, for an assault. I received no punishment. I don't know what kind of assault. Prisoner had been in my employ two months. Brother is not here; I left him at our shop. Brother was in this court in the morning; he went away about eleven, but I will not swear as to the time.]

Locke, for the prisoner, objected to the admissibility of the confession.

PARKE, B. It certainly does not appear that the confession was not made in consequence of an improper inducement.

W. M. Best, for the prosecution. It does not appear that the confession *was* made in consequence of such an inducement. If the evidence leaves that fact doubtful, the *onus* does not lie on the prosecution to prove the negative.

PARKE, B. Yes, it does. You are bound to satisfy *me* that the confession, which you seek to use in evidence against the prisoner, was *not* obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not.

This confession was therefore rejected. [I reject the evidence of admission, not being satisfied that it was voluntary. *MS. PARKE, B.*]

The wife of the other prosecutor was then examined.

[*Jane Blakemore*. Wife of brother of prosecutor. On 11th of March, I said to prisoner, there is a piece of duck lost; do you know any thing about it? He made no answer, but went out. He afterwards beckoned me, and told me if my husband would take William Dear and Bristol Jack, he would tell all. I had said nothing to him before that, he said that night. Prosecutor and the brother had not been to station and returned; they were absent. Then the prisoner told me, that night fortnight, that William Dear had come to the window, and told him he was not half wide awake enough, and that if he could get him a piece of duck, he would put it away for him, and that he, after hesitating, said he would, and that William Dear, Jos. Gillen, and Bristol Jack, would be at turning nearly right opposite, and William Dear was to whistle, and Warringham was to turn his back, and Jos. Gillen was to come in and take the duck away; and that the prisoner did so, and put the duck in the corner, and turned his face when William Dear whistled, and that all the three took it, and Gillen carried it. I did not tell. I told prisoner I would not tell until he told himself. I did not tell prosecutor till prisoner told me something.

Cross-examined. Prosecutor is married. I do not answer as to having been in any trouble. "Were you in prison?" I am not bound to answer that. I have been married four years, the 22d of last August. I was working in a manufactory. I was living with my mother eleven months. I was working at Mr. Wilson's. I did not tell prisoner, if he told me I would not tell. I told him, perhaps *it would be better for him, if he would tell them how we had been robbed*, and put us on our guard. I do occasionally take the management of the shop. I manage the shop in my brother and husband's absence, and live in the house. I stand behind the counter and serve.]

PARKE, B. Is this admissible?

Best. An inducement by the prosecutor's wife renders a confession inadmissible

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which they are obtained. It is remarked by Blackstone, 4 Bl. Com. 357, even in cases of felony, at the common law they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence. The law, therefore, distrusts confessions in criminal cases. As to the practice in early times, the law is barren of authorities, and little is known of it except by tradition. Lord Coke says nothing upon the subject; and the earliest reference to principle, in regard to the receivability in evidence of confessions, is to a case in *Hardres*, 139, referred to in *Gilbert*, Ev. 123, (see *Sedgwick's* edition,) where it is said to be contrary to natural justice for a man to be obliged to accuse himself; and the law on the subject seems to be none other than the application of the maxim, *Nemo tenetur prodere seipsum*. The law does not suppose a man to be guilty till he is proved to be so. Presuming, therefore, that a prisoner is innocent, it imputes to a man that he, being innocent, may, on an inducement, accuse himself falsely; and it says, that if a constable, or a person of authority, holds out to a prisoner any circumstance of worldly advantage to himself, as the consequence of making a confession, or of harm in not making it, a confession so made shall not be received in evidence.

LORD CAMPBELL, C. J. "You need not say any thing to criminate yourself; but what you do say will be taken down, and used as evidence against you." Do these words import a promise or threat?

Mills. Sure these words may be construed into a threat.

LORD CAMPBELL, C. J. Here there is no advantage held out to

only when it is held out in the presence of her husband. An inducement by the wife of a constable will not vitiate a confession.

PARKE, B. The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority.

This confession was, therefore, likewise rejected. [I think inadmissible. MS. PARKE, B.]

[Samuel Congdon. Prisoner was delivered to me on a charge; he said, there were others concerned as well as I. I did not speak to him before; this was on the 12th March.]

There being no other evidence, a verdict of *Not Guilty* was returned.

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him, and there is no harm threatened if the prisoner holds his tongue. You do not bring the facts within your canon.

Mills. If you show a prisoner that you entertain a strong conviction of his guilt, you disarm him, and what you say may induce him falsely to accuse himself. What is the inference that an accused person draws from your conduct, that if he does not confess the prosecution will be angry?

POLLOCK, C. B. If the constable had said, it may or may not be used for or against you, then the caution would have been free from objection.

LORD CAMPBELL, C. J. That is the form prescribed by the act of parliament to be employed by magistrates.

Mills. It amounts to this: You say to the prisoner, your case is so bad, that you cannot, if you speak the truth, deny it; in other words, if you speak the truth, you must confess. Therefore, according to the old cases, it is inadmissible. If it be a natural feeling that, when a man is accused of a crime, and he knows that suspicion rests upon him, and that he will not be believed if he directly denies his guilt, to make a statement by way of confession and avoidance, this case is within the rule.

LORD CAMPBELL, C. J. "You need not say any thing to criminate yourself;" do you contend that these words, if you were to stop there, would operate as an inducement?

Mills. No; but the whole must be taken together.

PARKE, B. What do you contend? Do the words amount to a promise of advantage, or to a threat?

Mills. That the words import an advantage.

PARKE, B. What is the advantage?

Mills. "Whatever you say will be given in evidence."

POLLOCK, C. B. No; not "*whatever you say*;" but "what you do say." If the word "*whatever*" had been employed, it might have been different.

Mills. I was under the impression that the constable had used

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the word "whatever," but it is not so. That word might have made the matter more pointed, but its omission does not make any material difference. The words amount to an absolute promise that the confession will be used in evidence, amongst the other evidence brought by the prosecution; they are not to be considered as a threat. In their proper signification, taken in their plain and literal sense, and construed in the only way in which they can be construed without reading them as a threat or as involving an absurdity; they hold out an assurance of advantage to the prisoner in regard to the charge, which renders the statement made on the strength of them inadmissible in evidence. They mean, what you say will be taken down and used as evidence against you, "as," that is to say, *in like manner as*, evidence against a prisoner; in other words, they will be used at the trial. It cannot be that the prisoner's statement would necessarily be something the effect of which would criminate him, and so be evidence against him; his statement might have been a detailed exoneration of himself. The words are certain in telling the prisoner that his statement would be used; and he is entitled not only by a favor due to him by law on the occasion, but also according to the rational interpretation of the words, to have "as evidence against him" construed to mean "*in like manner as*;" for otherwise the words, if not a threat, import an absurdity. The accused man sat with his face in his handkerchief, weeping, when the words were addressed to him; he had showed no intention of speaking; his situation was one to invite pity; and the words, "as evidence against," were prefaced with words of comfort. He was told, "you need not say any thing to criminate yourself." In effect, he was told, "speak, if you like, nor need you criminate yourself; what you like to say, however, shall be used at your trial; be warned, therefore, to say nothing against yourself." In *Rex v. Drew*, 8 Car. & P. 140, the prisoner was told "not to say any thing to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial." Coleridge, J., held this to be an inducement, and that the prisoner's statement could not be received in evidence; nor is this to be considered as a hasty decision. In *Regina v. Morton*, 2 Moo. & Rob. 514, the prisoner was told by the constable who apprehended him, "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me, or any body else, that may tend to injure you; but any thing that you can say in your defence we shall be ready to hear, or to send to assist you." Coleridge, J., excluded this statement, which was made in consequence of this address. He said: "Upon reflection, I adhere to my decision in *Rex v. Drew*. If the latter words had stood alone, a confession obtained by them would

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be clearly inadmissible; they are likely to produce an improper effect on his mind. Before such evidence can be received, it must be seen that the prisoner's mind is free from any false hope or fear that would be likely to operate upon it, and induce him to state that which is not true. If any such influence has been used, both the hope and the fear must be removed by a proper caution, before the prisoner's statement can be received. In *Drew's case*, the prisoner was told that what he said would be used for him. Is not that creating a hope that, if he told his story, whether true or false, it might benefit him. The caution that comes after does not take away the objection created by a promise in his favor; because it is impossible to say that the caution so modified the influence of the promise, as to leave his mind in an unprejudiced state to tell only the truth. Besides, the law will not sanction this sort of balancing the one influence with another; the prisoner's mind must be left entirely free. Approving of the decision quoted, I think this case comes altogether within the principle of it. The word "defence" necessarily conveying to the prisoner's mind that what he said would be for his benefit, the hope is created, and remains. As to what has been said about the effect of this decision being to exclude every thing said before the magistrates, I altogether differ from it. It is the duty of a magistrate to give the prisoner the opportunity of saying what he chooses, whether for or against himself, provided no improper influence be used. But when a man interferes who has no such duty, and uses language tending improperly to influence the prisoner's mind, the statement cannot be received." This decision is perfectly rational, and warrants as in that case, so in this, that the caution given to the prisoner may be read as if the words "against you" had not occurred in it; if constables and others will inform prisoners of the consequences of making a statement, it is only just to require that they should do so correctly, and not to hold out to them unfounded hopes of advantage from making statements. Another decision on this point is *Regina v. Furley*, 1 Cox, 76. There the prisoner was told by a policeman, whatever she told him would be used against her on her trial. Maule, J., decided this case on the authority of *Rex v. Drew*; holding, that to assure the prisoner that whatever she said would be used at her trial, was holding out to her an advantage which rendered her statement inadmissible. He said, where any caution at all is given, the proper course is to let the prisoner know what he says may do him harm, but cannot possibly do him good. His words, also, are: "If you promise a person that what he states will, at all events, be used at the trial, you may be thereby inducing him to confess."

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PARKE, B. In consequence of the strong opinion entertained by Maule, J., upon the question, I reserved a case at Aylesbury; but there the prisoner was acquitted.

LORD CAMPBELL, C. J. It was in consequence of the decisions of my brother Coleridge and my brother Maule, and of a statement that my brother Parke had reserved the point, that I reserved this question.

Mills. The miserable advantage of having made a confession at any early stage, in the hope that he would derive some benefit or degree of mercy from having made it, may operate upon the mind of a prisoner; and you have no business to trap a man into a confession. There is another case decided by Maule, J., *Regina v. Harris*, 1 Cox, 206, where the prisoner was cautioned, as in the case of *Regina v. Furley*, and where the confession was likewise excluded.

PARKE, B. On referring to my notes of *Regina v. Warringham*, I find that the words there used were, "It would be best for him if he would tell how it was transacted." The object of the report in *The Jurist* was to show, that where an inducement has been held out, it is incumbent on the prosecution to show affirmatively whether the inducement was made before or after the confession.

Mills. That undoubtedly was the object of the report, and your lordship's correction renders the case inapplicable to this argument. It was remarked by the Court in *Thompson's case*, at the Old Bailey, 1783, 1 Leach, C. C. 291, 293, (4th ed.) "too great a chastity cannot be preserved on this subject," referring to the confessions of prisoners; and Wilde, C. J., in another case rejected evidence, because it had been obtained in answer to questions put to the prisoner.

LORD CAMPBELL, C. J. Prisoners are not to be interrogated. By the law of Scotland, they may be; but by the law of England, they cannot.

Mills. In the case of *Rex v. Green*, 5 C. & P. 312, it was remarked by Gurney, B., that it was proper to caution the prisoner that any confession he made would be admissible against him at the trial, and could do him no service; and in *Rex v. Arnold*, 8 Car. & P. 622, Lord Denman lays down the proper caution to be used by magistrates, which seemed framed to prevent prisoners from supposing that they shall necessarily have what they may say adduced at the trial. The object of 11 & 12 Vict. ch. 18, was to sanction the rule

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as laid down by Lord Denman; and it is to be noted that the statute uses the word "may" instead of "will."

Power and *Newton*, for the crown, were not called on to address the Court.

LORD CAMPBELL, C. J., intimated, that as he had reserved the case for the consideration of the Court, he should prefer hearing the judgment of the other judges before expressing his opinion.

POLLOCK, C. B. I am of opinion that the conviction is right; that the evidence was properly received. I consider that the grounds for not receiving such evidence are not those stated by the learned counsel in his elaborate and able argument, from a review of all the cases, that there is a presumption of law one way or other. The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false, or that the law considers such statement cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury. A simple caution to the accused to *tell the truth*, if he says any thing, has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put, that when a person is told to tell *the truth*, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say any thing; but if he says any thing, let it be true. It has been decided, that that would not prevent the statement being received in evidence, by Littledale, J., in the case of *Rex v. Court*, 7 Car. & P. 486, and by Rolfe, B., in a case at Gloucester, *Rex v. Holmes*, 1 Car. & K. 248; but where the admonition to speak the truth has been coupled with any expression importing that it would be *better* for him to do so, it has been held that the confession was not receivable; the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Regina v. Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not. With regard to the cases of *Regina v. Drew* and *Regina v. Morton*, with the greatest respect for my brother Coleridge, I do not approve of the decision in the former, or of the argument used to uphold it in the latter. I think the statement made by the prisoner in *Regina v. Drew* ought not to have been rejected. He was told, "that what he

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said would be taken down, and would be used for him or against him at the trial." The whole effect of the sentence was, that the man was told that whatever he said would be taken down and used as evidence in the cause; that is, the truth would be stated on the trial. I first heard of the opinion of my brother Maule in 1845, and I required it to be vouched, either by print or a manuscript note, that there had been such a decision. With every veneration for the opinions of my brother Maule, I cannot agree with his view on this subject; and I have myself decided the other way, offering to reserve a case for the consideration of the judges. The question now is, whether the words employed by the constable, "*he need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him,*" amount either to a promise or a threat? We are not to torture this expression, or to say whether a man might have misunderstood their meaning; for the words of the statute might, by ingenuity, be suggested to raise in the mind of the prisoner very different ideas from that which is the natural meaning. The words are to be taken in their obvious meaning. It is very important for the protection of innocence that any man charged with a crime should be told, at the time of his apprehension, what that charge is. Attention should be paid to any communication made by him at that time, because, generally, a prisoner has no means of paying for witnesses. The accused may frequently be in a situation at once to say that he was in such a place, and could prove an *alibi*, and may be able to make some statement of extreme importance, in order to show that he did not commit the crime, or was not the person intended to be charged. In criminal trials, I make a point of inquiring whether the prisoner made a statement on being first taken into custody; and I have known repeatedly an acquittal occur, chiefly on the grounds of what the prisoner stated at the time of his apprehension. It is proper that a prisoner should be cautioned not to criminate himself; but I think that what he says ought to be adduced, either as evidence of his guilt or as evidence in his favor. For these reasons, I think that the Lord Chief Justice properly received the confession at the trial.

PARKE, B. I entirely agree with the Lord Chief Baron, and with the view taken by Lord Campbell at the trial. The prisoner was tried upon an indictment charging him with having administered poison to his wife, with intent to murder her. On the part of the prosecution, a police constable was called, whose evidence thus began: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with; he made no reply, and

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sat with his face buried in his handkerchief. I believe he was crying. I said, *he need not say any thing to criminate himself; what he did say would be taken down and used as evidence against him.*" Objection was made, on behalf of the prisoner, that what he then said was not admissible. His lordship thought that the words of the statute were merely a direction; and that although the caution of the constable differed from that directed by 11 & 12 Vict. ch. 42, § 18, to be given by the justice to the prisoner, in the word "will" instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could have no tendency to induce him to say any thing untrue; and that, in spite of it, if he did afterwards confess, the confession must be considered voluntary. In that I entirely concur, and I think that the reasons given by the Lord Chief Justice are satisfactory. By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement, in the nature of a promise or of a threat, held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. 1 Taylor on Ev. § 639. We all know how it occurred. Every judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were *res nova*, I cannot see how it could be argued that any advantage is offered to a prisoner by his being told that what he says will be used in evidence against him. I have the most unfeigned respect for Coleridge, J., and Maule, J., and in deference to their decisions, I offered to reserve a case at Aylesbury, but I cannot concur in their judgment. I have reflected on *Regina v. Drew* and *Regina v. Morton*, and I have never been able to make out that any benefit was held out to the prisoner by the caution employed in those cases. We ought, therefore, to be extremely obliged to Lord Campbell for having reserved the point, in order that it might be settled.

ERLE, J. I think that the statement of the prisoner was properly received. In my opinion, the best defence of innocence is founded on the statement which he is shown to have used when first accused;

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and I am of opinion that, when a confession is well proved, it is the best evidence that can be produced, and that unless it be clear that there was either a threat or a promise to induce it, it ought not to be excluded. I am much inclined to agree with Mr. Pitt Taylor; and according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of *guilt*. The words "*will*" or "*may*," as used in the caution, are, in effect, the same; one being absolute, the other contingent. In the able argument that has been addressed to us, it has been contended that the assurance that the statement *will* be used promises an advantage, and should, therefore, exclude the confession; whilst it is admitted that this supposed advantage promised contingently does not exclude it. But if it be an advantage when promised positively, it is also a promise of advantage when made contingently; and if it does not exclude in one, neither ought it in the other.

WILLIAMS, J. I am entirely of the same opinion. What was said to the prisoner was nothing more than that what he said would not be kept secret, but would be used in evidence; and it is an over-refinement to say, that a statement made after such a caution was inadmissible.

LORD CAMPBELL, C. J. I adhere to the opinion which I formed at the trial. The rule I take to be as Mr. *Mills* has stated it, that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury. If the matter were *res integra*, I should, perhaps, have doubted whether it might not have been advisable to allow the confession to be given in evidence, and let the jury give what weight to it they pleased; but I do not in the slightest degree intend to break in upon the rule laid down by Mr. *Mills*. With regard to the decisions of my brother Coleridge and my brother Maule, with the greatest respect for them, I disagree with their conclusions. It was in deference to their ruling that I reserved this point, not that I entertained any doubt upon the question myself. I am very glad to find that all this Court concur in the view which I took at the trial, that the evidence was admissible.

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REGINA v. MOORE.¹

June 14, 1852.

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The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions.

THE prisoner was tried at the last Assizes for Sussex, before PARKE, B., on the coroner's inquisition, for wilful murder of her new-born child. There was an indictment also against her for the same offence. She was found guilty of the misdemeanor of concealing the birth of her child.

There was offered in evidence against her a confession made by her, in the presence of her mistress, to a surgeon who attended her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found, with the thread round its neck. Her mistress had told her, before the surgeon came in, that "she had better speak the truth," and, in answer, she said she would tell it to the surgeon.

An objection was taken, that any subsequent confession was inadmissible. After consulting Coleridge, J., his lordship received the evidence, being of opinion that in this case, her husband not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth.

The prisoner was acquitted of the murder, because the jury believed that she was in such a state of mind that she did not know what she was about at the time.

The learned baron, therefore, requested the opinion of the judges, whether the evidence was admissible.

On the 24th April, A. D. 1852, this case was argued before POLLOCK, C. B., PARKE, B., ERLE, J., WILLIAMS, J., and CROMPTON, J.

¹ 2 Denison, C. C. 522; 5 Cox, C. C. 555; 12 Eng. Law & Eq. Rep. 583.

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Creasy, for the prisoner. The question for the Court is, whether the words, "*she had better speak the truth*," spoken to the prisoner, a domestic servant, *by her mistress*, were such an inducement as to render the confession made by her inadmissible in evidence. In the case of *Regina v. Garner*, 1 Den. C. C. 329, where a girl, thirteen years of age, who was indicted for administering poison to her mistress, with intent to murder her, and the surgeon who attended the mistress said to the prisoner, in the presence of her mistress, that "it would be better for her to speak the truth," the confession was excluded; but it must be confessed that a distinction may be taken between that case and this.

ERLE, J. As a universal rule, an exhortation to tell the truth ought not to exclude a confession.

Creasy. Nor is the present case like the case of *Rex v. Upchurch*, 1 Moody, C. C. 465, because there the prisoner, a girl, had attempted to set fire to her master's house, and his wife, her mistress, who took part in the management of the house, said, "Mary, my girl, if you are guilty do confess; it will, perhaps, save your neck."

POLLOCK, C. B. Nor is the present case like the case of *Regina v. Garner*, for there a domestic servant had attempted to murder her mistress, in whose presence the inducement was held out.

PARKE, B. The question is, whether an inducement held out by the wife of a person not being the prosecutor, and the offence not being connected with the management of the house, is sufficient to exclude the confession?

Creasy. In *Rex v. Kingston*, 4 Car. & P. 387, where, on an indictment for administering arsenic, it appeared that the surgeon who was called in said to the prisoner, "You are under suspicion of this, and you had better tell all you know."

PARKE, B. That has nothing to do with the present case.

Creasy. All the cases are collected in *Gilham's case*, 1 Moody, C. C. 186, where a confession made in consequence of the exhortation of a clergyman, was held to be admissible; and are also in Joy on Confessions. *Rex v. Rowe*, R. & R. 153; *Regina v. Taylor*, 8 Car. & P. 735; *Rex v. Simpson*, R. & M. C. C. 410. In none of the cases where the inducement was held to exclude the confession, was the offence unconnected with the person, or property, or dwell-

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ing house of the master and mistress, as in the present case; and the question is, can the Court extend the rule respecting persons in authority to the master and mistress of the person in whose house an offence of this nature has been committed? But it is submitted that the Court is not so much to inquire whether the inducement was held out by the prosecutor, as whether the person who held it out was *likely* to be the prosecutor? In criminal cases, the Crown is the prosecutor, but the Crown is put in motion by private individuals; and a case occurred not very long ago, where three persons were endeavoring to act the part of the prosecutor. The master and mistress of a house, in which such an outrage had been committed, were most likely to become the prosecutors. If the test, who was likely to be prosecutor be strictly applied, a married woman never would be bound over to prosecute. But who would be so likely to give information as the master and mistress? What party would be more likely, considering the nature of the offence, to interfere, than the mistress? Suppose the matter hushed up; if the master and mistress had been parties to the concealment of the offence, would they not have been guilty of misprision of felony? It is said that the offence has nothing to do with the management of the house. But who has so much authority over the mind of a maid-servant as her mistress? Is it not in the department of the wife to look after the morals of her female servants? We must not look at the case as lawyers, but consider what would be the natural result of an inducement by such a person. The test is not, it is submitted, who is the party to set justice in motion, but who is most likely to have influence? Who is it most natural that the prisoner should look to? The mistress, *qua* mistress is also said to be a person in authority. It is said by Mr. Pitt Taylor, 1 Taylor on Ev. § 631: "And first, as to the person by whom the inducement is offered. Here it is very clear that if the promise or threat be made by any one having authority over the prisoner, as, for instance, by the prosecutor, the master or mistress of the prisoner, the constable, or other officer or person having him in custody, a magistrate, or the like, the confession will be rejected, as not being voluntary." In 2 Russell on Crimes, 839, it is observed: "With regard to the persons, whose inducements will prevent the admission of confessions, it should seem that all who are engaged in the apprehension, prosecution, or examination of a prisoner, are considered as persons of such authority, that their inducements will exclude any confession thereby obtained. Thus, an inducement held out by the prosecutor, or the prosecutor's wife, or his attorney, or by a constable, or the prosecutor, in the apprehension or detention of the prisoner, or by a magistrate acting in the business, or other magistrate, or magis-

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trate's clerk, or by a gaoler or chaplain of a gaol, or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, or by a master or mistress to a servant, or by a person having authority in the matter, or by a person in the presence of one in authority, with his assent, whether direct or implied, will be sufficient to exclude a confession made in consequence of such an inducement." *Rex v. Parratt*, 4 Car. & P. 570.

PARKE, B. Russell says, all who are engaged in the apprehension, prosecution, or examination of the prisoner.

Creasy referred to *Regina v. Taylor*, 8 Car. & P. 733. Suppose an article stolen from an inmate in the house by a servant, would not the mistress have a presumable authority? The law, in various ways, recognizes the authority of a master and mistress over their servants, inflicting heavier punishments upon servants guilty of larceny from their master or mistress; and, formerly, in making the murder of either of them petty treason.

No person appeared as counsel for the Crown.

Cur. adv. vult.

On the 14th June, A. D. 1852, the following judges being present, JERVIS, C. J., PARKE, B., ALDERSON, B., MAULE, J., CRESSWELL, J., PLATT, B., TALFOURD, J., and MARTIN, B., the following judgment was read by

PARKE, B.¹ The cases on this subject have gone quite far enough, and ought not be extended. It is admitted that confessions ought to be excluded unless voluntary, and the judge, not the jury, ought to determine whether they are so. One element in the consideration of this question, as to their being voluntary, is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held, (when it was determined that the judge was to decide whether the confession was voluntary,) that in all cases he was to decide that point upon his own view of *all* the circumstances, including the nature of the threat or inducement, and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a

¹ The Editor is indebted to the kindness of Baron PARKE, for his lordship's MS. of the above judgment.

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rule has been laid down in different precedents, by which we are bound, and that is, that if the threat or inducement is held out actually or constructively, by a person *in authority*, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable, is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible.

The authorities are collected in Mr. Joy's very able Treatise on Confessions and Challenges, p. 23.

But in referring to the cases where the master or mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress, that their holding out the threat or promise renders the confession inadmissible. In *Rex v. Upchurch*, 1 Moody, C. C. 465, the offence was arson of the dwelling-house, in the management of which the mistress *took a part*. *Regina v. Taylor*, 8 C. & P. 733, is to the like effect; so *Regina v. Hearne*, C. & M. 109; *Regina v. Hewett*, C. & M. 534; so where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case, also, the master of the ship threatened to apprehend him, and the offence being a felony, and a felony actually committed, would have a power to do so, on reasonable suspicion that the prisoner was guilty. In *Regina v. Warringham*, ante, p. 167, the confession was in consequence of what was said by a mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my note. In the present case, the offence of the prisoner, in killing her child, or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence; in practice, the prosecution is always the result of a coroner's inquest. Therefore, we are clearly of opinion that the confession was properly received.

Conviction confirmed.

It is a frequent subject of discussion, under what circumstances the confession of a prisoner is admissible in evidence. The opinions of individual judges, as reported in the *Nisi Prius Reports*, are conflicting; and the summary of the law in the text-books is too brief to be satisfactory, and is often inconsistent, from a neglect to analyze minute distinctions in the facts of the several cases.

It may be said of this subject, as it is by a late learned writer and eminent judge

on another point of evidence in criminal cases, "if it be important, and none can doubt that it is so, that this testimony should be received, it is important that the rules which govern its reception, should be rightly understood. Yet there is hardly any question in the law upon which a greater diversity of opinion prevails. This is the more surprising, as the inquiry presents no peculiar difficulty. There is no intricate problem to be solved, no recondite principle to be explored or

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extracted." Chief Baron Joy, on the Evidence of Accomplices.

The subject has been, in some degree, perplexed by a practice that has grown up of citing the dicta of judges upon circuit, without reference to their agreement or disagreement with decided cases, and their decisions are given in the text-books, in a form so condensed, and the facts upon which they are founded are so sparingly detailed, that it seems often unfair to the judges who pronounced them, to press them upon the court as authorities. It was remarked by Lord Manners, that "it is always unsatisfactory to abstract the reasoning of the court from the facts to which that reasoning is meant to apply. It has a tendency only to misrepresent one judge, and to mislead another." *Revell v. Hussey*, 2 Ball & Beatty, 286.

It is endeavored, in the following pages, to abstain, as far as possible, from giving the opinions of judges irrespectively of the precise facts on which they are grounded, and of decisions which have been made upon the same points; and the object in citing so many *nisi prius* cases, is not to claim authority for any case *per se*, but to compare them one with another, and with decisions of the courts above, and with resolutions at the meetings of the judges on points reserved, and thereby to ascertain how far they are to be considered as law, and how far they are inconsistent or inapplicable as precedents.

The reference to the dicta of judges at *nisi prius*, as binding upon succeeding judges, has been deprecated by very high authorities. When a dictum, even of Sir Matthew Hale, was cited to the Court of Common Pleas, when Lord Loughborough presided there, that learned judge said: "Although I entertain the highest respect for the authority and character of that great judge, yet it would be doing injustice to his memory to take every hasty expression of his at *nisi prius* as a serious and deliberate opinion," and on the same occasion, Mr. Justice Wilson remarked, that the passage cited was "a *dictum*, not a judicial opinion of Sir Matthew Hale. Every one, who hears me, must acknowledge the impropriety of construing all the

conversation which passes between the judge and counsel at *nisi prius*, as legal decision." 1 H. Blackstone, 53, 63.

So, in a later case, when an opinion, expressed extra-judicially by Lord Kenyon, was cited in the King's Bench, Best, J., said: "No man can entertain a higher respect for the memory of that noble and learned judge than I do, but *nisi prius* decisions, coming even from him, unless they have been acted upon by succeeding judges, sitting in bank, are entitled to very little consideration." *Parton v. Williams*, 3 Barnewall & Alderson, 841, where the opinion of Lord Kenyon in *Postlethwaite v. Gibson*, 3 Espinasse, 226, was cited. And in a subsequent case, the same learned judge, when chief justice of the Common Pleas, says, in reference to a case before Perrott, B., "It is not right to repeat opinions hastily formed, and delivered in the hurry of trial; and the practice of referring to them has occasioned all the confusion that the enemies of our law object to." *Johnson v. Lawson*, 2 Bingham, 90. It will not be found useless to bear these observations in mind in relation to the law on the admissibility of confessions in criminal cases.

Mr. Justice Chaumbré, in 1809, complained of "the obscurity and discordance of the cases" upon this subject; Russell & Ryan, C. C. 154; and if the opinions of individual judges, reported since that period, are taken into account, such obscurity and discordance may not seem much to have diminished. Under such circumstances it becomes necessary to weigh and compare authorities, adopting the principle of Grotius: *Sicut in facti quæstionibus, id pro vero habetur, unde plures maximeque idonei stant testes, ita sententiarum eas sequendas, quæ plurimis præstantissimisque nitantur auctoribus.*

It will be found on examination, that the law on this important branch of evidence in criminal cases, as deduced from principle and supported by the weight of authority, is, in most instances, definite and clear.

The confession of a prisoner is in the nature of presumptive evidence. It is admitted in evidence upon the presump-

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tion, that a person will not make an untrue statement militating against his own interest. *Phillipps, Ev.* (8th ed.) 419. It may be convenient to endeavor to reduce the law upon this subject into a series of distinct propositions, and to show, by reference to decided cases, how they bear upon such propositions respectively.¹

SECTION I. A confession is not admissible in evidence where it is obtained by temporal inducement, by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, or where there is reason to presume, that such person appeared to the party to sanction such threat or inducement.

The first branch of this proposition was adopted, in nearly the same terms, in *The State v. Bostick*, 4 Harrington, 563, 564.

The master or mistress, or prosecutor of a prisoner, as well as a magistrate or constable, is considered a person in authority, so as to exclude a confession made under these circumstances. *The State v. Bostick*, 4 Harrington, 564.

Thus, in *Rex v. Upchurch*, 1 Moody, C. C. 465, a leading case, the prisoner, a girl of thirteen, was tried for attempting to set fire to the prosecutor's house. She was his servant. After the attempt was discovered, the prisoner came into her mistress' room in the absence of the prosecutor. Her mistress said to her: "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will

have to go to prison; if W. H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. Her mistress then said, "pray tell me if you did it?" The prisoner confessed. It was contended on the part of the crown, that the prosecutor's wife had no authority, real or apparent, over the prisoner, so as to hold out any hope that could influence her to make a false statement that her life might be spared, and, therefore, that the confession was admissible, and *Rex v. Hardwick*, *Phillipps on Ev.* 429; 1 *Carrington & Payne*, 98, note; and *Rex v. Row*, *Russell & Ryan*, C. C. 153, were cited. Parke, B., reserved the point.

In Hilary Term, 1836, all the judges present, Lord Denman, C. J., Tindal, C. J., Lord Abinger, C. B., Parke, Littledale, Gaselee, and Williams, JJ., Parke, Bolland, and Gurney, BB., were of opinion that the confession ought not to have been received. See also *Regina v. Sarah Taylor*, 8 *Carrington & Payne*, 733, post, p. 187.

In *Drew's case*, 8 *Carrington & Payne*, 140, coram Coleridge, J., a confession was held inadmissible, where the party was told that what he would say would be used for him or against him on his trial, the ground of which decision, it has been remarked, was probably this, that "the mind of man, especially the mind of a prisoner, is more prone to hope than fear." The (*London*) *Law Magazine*, vol. 27, p. 340, in an able article upon

¹ It has been suggested, as likely to make these pages practically more useful, that many of the cases should be cited at some length, and that the facts should be given, at least in substance, upon which the decision was made, and also the ground of the decision, as reported in the original cases, which are seldom accessible on circuit. Counsel citing a case, and the court may thus judge of the weight and application of the authority, which, from the summary and often abstract reference of the text-books, seems, in many instances, impossible, without referring to the cases themselves.

With the same object it is useful to refer, even at the hazard of repetition, more than once to the same case, where it bears, in its different parts, upon different points, as is so often done by Mr. Fearn — no mean authority — in his work on *Remainders*.

It is usually stated, where the Reports furnish information, whether the prisoner was acquitted or convicted, as, in the latter instance, when the judge has admitted a confession in evidence, and has not reserved a case for the judges, it may generally be presumed that no doubt was entertained of its admissibility, and that it was not pressed by counsel as a case fit to be reserved.

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modern Common-Law Reports. But this depends upon the constitutional temperament of the individual. Tacitus, a shrewd observer of human nature, remarks: *Fortes et strenuos, etiam contra Fortunam, insistere Spei; timidos et ignavos ad desperationem Formidine properare.*

In *Jones's case*, Russell & Ryan, C. C. 152, which came before the judges on another point, the prosecutor said to the prisoner, before the confession was made, "he only wanted his money, and if he gave him that, he might go to the devil if he pleased." The confession was rejected. So in *Jenkins's case*, Russell & Ryan, C. C. 492, where the prisoner was induced by a promise from the prosecutor to confess his guilt.

In *Hearne's case*, Carrington & Marshman, 109, on an indictment for arson, the promise was, in terms, confined to a different offence from that for which the prisoner was indicted. It was proved by the prosecutor, that soon after the house was discovered to be on fire, certain household articles were found in the sucker of the pump, and witness said to the prisoner, that if she did not tell the truth about those things he would send for the constable to take her, but that he did not say any thing about the fire. Coltman, J., refused to admit the confession, on the ground that this was an inducement to confess, and that the transaction was really all one.

In *Mills's case*, 6 Carrington & Payne, 146, a constable, whilst he had the prisoner in custody, asked him "whether he had committed the felony?" He denied it. The constable then said, "It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it." Gurney, B., held this was an inducement, and refused to receive the statement. These words seem to have been construed by the learned judge as the same in effect, as if the constable had said, it will be better for you to confess it, for we can prove it, whether you do or not.

In *Shepherd's case*, 7 Carrington & Payne, 579, a constable, who apprehended the prisoner, asked him "what he had done with the tap he had stolen from

the prosecutor's premises? and said, you had better not add a lie to the crime of theft." Gaselee, J., after expressing some doubt, refused to receive the confession. The manner in which these words were used may have been considered by the learned judge, who saw and heard the witness, to be of a threatening nature, and calculated to lead the prisoner untruly to confess himself guilty; or the words may have been deemed in effect the same, as if the constable had said, you have committed a theft; it will be better for you not to deny it—that is, to confess. The words viewed in this light, imply an inducement rather than a threat. This case has been controverted. See 2 Russell, Crim. Law, (3d ed.) 829, note.

In *Thomas's case*, 6 Carrington & Payne, 353, the words were, "you had better split and not suffer for all of them." Patteson, J., rejected the evidence. These words seem calculated to have led the prisoner to suppose that he would be more mercifully dealt with if he would confess, and might therefore induce him to confess himself guilty of an offence which he had not committed. See note of the reporters, 6 Carrington & Payne, 353.

In *Enoch's case*, 5 Carrington & Payne, 539, a constable, going to attend the inquest on the body of the deceased, placed a female with the prisoner to prevent her from going away, or laying violent hands on herself. This person said to the prisoner, in the absence of the constable, that "she had better tell the truth or it would lie upon her, and the man would go free." Parke, J., after conferring with Taunton, J., refused to receive this in evidence. He considered the prisoner as in the custody of the woman, who had held out the inducement. She was therefore to be deemed, *pro tempore*, as a person in authority over her. It has been doubted whether the words used to the prisoner in this case, held out either an inducement or threat, having a tendency to cause an untrue confession.

A female servant being taken into custody by a policeman, expressed a wish to change her clothes. The policeman told

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her she might do so, but must remain in custody, and he gave her into the charge of a Mrs. A., a married daughter of her master, but who did not live in her father's house, and had no control over the prisoner by reason of any relation of master or servant. While Mrs. A. and the girl were alone together, and both considering that the latter was in custody, a confession was made. On a case reserved, the judges were of opinion that Mrs. A. was not a person who had authority to hold out an inducement so as to render the confession inadmissible. *Regina v. Sleeman*, 1 Dearsly, C. C. 269; 6 Cox, C. C. 245; 22 Eng. Law and Eq. Rep. 606.

Of the influence of a threat in excluding a confession, the following are examples: *Parratt's case*, 4 Carrington & Payne, 570, where a threat of committal to prison was used by the captain of a ship to a mariner on board; and *Thompson's case*, 1 Leach, C. C. (4th ed.) 291, where the prosecutor threatened to take the prisoner before a magistrate, unless he would give a more satisfactory account. See also *Shepherd's case*, 7 Carrington & Payne, 579, already cited, ante, p. 185.

The leading case upon the second branch of the above proposition as to the sanction of a person in authority, is *Simpson's case*, 1 Moody, C. C. 410, before the judges in 1834, the real import of which does not appear to be correctly abstracted in the text-books. It is a long case, and it is difficult to condense it without losing its true bearing; its substance, however, seems contained in the following abstract: The prisoner was indicted for maliciously setting fire to the house in possession of the prosecutor, Blackburn. The prisoner was about fifteen years old, and was a servant in the prosecutor's house. On the morning after the fire, Mrs. B., the mother of the prosecutor's wife, (and who lived a few yards distant,) told the prisoner in the prosecutor's house, in the presence of the prosecutor's wife, the prisoner's mistress, who was very deaf, and in the presence of the prisoner's mother, that she had better confess the truth, because she believed it was she that fired the house, and that it would be a great deal

worse for her if she did not confess. The prisoner denied it. On the same day, she was taken by a constable before a magistrate at S.; and on the following day, Mrs. B. met her, and again charged her—she again denied. Soon after, a witness (H.) came up and joined them, and said to the prisoner, "Don't be so bold; perhaps you will have to go to S. again to-morrow—perhaps some one will come forward that saw you do it." She still denied it. He then said, "If you be guilty, go along with Mrs. B. and beg your master and mistress's pardon, and get away, and be better in future, and we shall not seek after you; never mind your wages; I'll give you a few shillings out of my own pocket." He also told her it would be better for her to confess. After he went away, Mrs. B. went with the prisoner to the prosecutor's house, and talked to her about the fire on the way; *they then went out of the house*, and after telling her, that if she went to S. again, it would be worse for her; and repeatedly, both on the road and also in the house of the prosecutor, and out of doors, that it would be a great deal better for her to confess, and a great deal worse for her if she did not. She said to her, out of the house, "now, you lighted the bunch of matches, and put it into the thatch." The answer to the question was, "Yes, I did." Mrs. B. then told the prosecutor's wife what had passed, *and she then came out*.

Counsel for the prisoner objected to her answer being received, on the ground that after the promises and threats held out, she should have been cautioned. The learned judge (Littledale, J.) received the evidence; but reserved the case for the opinion of the judges. The prisoner was found guilty.

In Easter Term, 1834, all the judges met; and they were unanimously of opinion, that the confession ought not to have been received, and that the conviction was bad.

It appears from the above report, that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied

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sanction, that the prisoner was told, in the first instance, that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out in the prosecutor's house;¹ and, although it does not appear distinctly, whether the prosecutor or his wife was then present,² the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife and in his house, may perhaps be considered to have continued.

That the wife of the prosecutor, where she is also the mistress of the prisoner, (or, in the case of an offence committed against several persons in partnership, the wife of one of them, who assists in the management of their business, *Regina v. Warrington*, ante, p. 167,) is considered as a person in authority, is decided in *Upchurch's case*, before the twelve judges, already cited; and was so held in *Sarah Taylor's case*, coram Patteson, J., 8 Carrington & Payne, 733. This rule, however, as appears by the text, (*Regina v. Moore*,) does not apply to a case where the charge against the servant has no relation to the persons or property of the master or his family; *e. g.*, to a case of child murder, or concealment of birth.

In *Row's case*, Russell & Ryan, C. C. 153, (1809,) the prisoner was in the custody of a constable, when he was advised by his neighbors to tell the truth, and consider his family; and it might, therefore, be said that, *primâ facie*, such advice was given with the implied assent or sanction of the constable. But there were probably circumstances in the case which negatived such assent, for the ground on which the confession is reported as having been deemed admissible by the judges is, that the advice was neither given nor sanctioned by any person, who had any concern in the business.

The admissibility of the evidence in this case might, it seems, be supported upon

quite a distinct ground, the advice given to the prisoner "to tell the truth," not implying either a threat, promise, or inducement to confess himself untruly guilty, unless the words "and remember his family," can be considered to make a difference. See *Court's case*, 7 Carrington & Payne, 486, coram Littledale, J., post, p. 189.

Enoch's case, 5 Carrington & Payne, 539, already cited, and which was decided upon another ground, might also, perhaps, be supported on this principle, that what was said to the prisoner by the person in whose custody she was placed by the constable, might be reasonably presumed by the prisoner to have been sanctioned by such constable.

So in *Drew's case*, 8 Carrington & Payne, 140, coram Coleridge, J., where the inducement was held out by the magistrate's clerk, in the presence of the magistrate.

Moody's case seems to fall within the same principle. 2 Crawford & Dix, C. C. (Antrim Spring Assizes, 1841,) 347, an indictment for poisoning. A female witness stated, that when the prisoner, a young girl, was in the police barracks, witness said to her, "If any other person had to do in the case, it is better you should tell." The witness was not the prosecutrix; nor did she know whether the prisoner was in the actual custody of the police at the time or not. The cases of *Rex v. Enoch*, 5 Carrington & Payne, 539, ante, p. 185, and *Rex v. Thomas*, 6 Carrington & Payne, 353, ante, p. 185, were cited on the part of the prisoner. The counsel for the crown argued that the statement was admissible, as neither threat nor promise was held out by the witness. Torrens, J., refused to receive it. If the ground of this decision was the implied sanction of the police, who were present at the police barrack when the witness held out this inducement to the prisoner, it seems supported by previous cases.

The point may be considered to be set-

¹ Mr. Greaves quotes this passage, and says: "This is an error; it was after they went out of the house." 2 Russell, Crim. Law, (3d ed.) 842, note.

² The learned editor, in the same note, also says: "It is clearly to be inferred that they were not present; for after the prisoner said 'I did,' Mrs. B. told the prosecutor's wife, and she then came out."

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tled, that, although the inducement to confess was not actually offered by the person in authority, if it were held out by any one in his presence, and he, by his silence, sanctioned its being made, the confession will be rejected. In *Regina v. Luckhurst*, 1 Dearsly, C. C. 245; 6 Cox, C. C. 243; 22 Eng. Law and Eq. Rep. 604, (1853,) the prisoner was indicted for an unnatural crime with a mare. Taylor, who kept his mare in a stable at an inn, of which Willard was landlord, saw the prisoner in the stable with the mare, under circumstances that made him suspect the commission of the offence. Willard and Taylor afterwards went to the prisoner, and Willard threatened to give the prisoner in charge to the police if he did not tell what business he had in Taylor's stable. At that time the charge had not been made known to the prisoner, but it was immediately afterwards, and then he confessed. The confession was held to be inadmissible in evidence. Parke, B., delivered the opinion of the judges as follows: "We, who have considered this case, are all of opinion that the evidence of Willard, to prove the confession, was not admissible. First of all, there was a threat used by him, for he says to the prisoner, 'If you do not tell me, I will give you in charge of the police.' It is true that at the time the threat was uttered, it was not precisely known what the charge was, but before the prisoner made any confession, he is told by Willard that the charge against him is that he had had connection with the mare. Willard, it may be objected, was not a person having any authority to hold out an inducement so as to render a confession made after it inadmissible. But the threat was made in Taylor's presence, who was there during the whole interview, and it was just the same as if it had been made by Taylor himself. Now he was the owner of the mare, and a likely person to prosecute him for the offence. He was therefore a person in

such a situation that any inducement held out by him would prevent the confession being receivable. We think that this confession was made under an inducement of a threat held out by Willard under such circumstances as to render it equivalent to a threat by Taylor himself." See also *Rex v. Pountney*, 7 Carrington & Payne, 302; *Regina v. Laugher*, 2 Carrington & Kirwan, 225; *The State v. Roberts*, 1 Devereux, 259.

But the threat or inducement held out must have reference to the prisoner's escape from the charge, and be such as would lead him to suppose, it will be better for him to admit himself to be guilty of an offence, which he never committed.

In *Thornton's case*, before the judges, where a constable had harshly interrogated a boy of fourteen years of age, when under detention without a warrant, and accused him of telling falsehoods, and in a manner "calculated to intimidate"¹ and made him cry, but held out no promise or threat as to his escaping from the charge against him, the confession was held admissible by seven judges out of ten. 1 Moody, C. C. 27, Trin. Term, 1824.

In *Lloyd's case*, 6 Carrington & Payne, 393, a person said to the prisoner in custody, his wife being also in custody on the same charge in a separate room, "I hope you will tell, because Mrs. G. (the prosecutrix) can ill afford to lose the money." A constable then said, "If you will tell where the property is you shall see your wife." Here an inducement was held out, and by a person in authority. Patteson, J., admitted the evidence, as this was not such an inducement to confess as could exclude it; that it amounted only to this, that the prisoner should see his wife if he told where the money was. The prisoner was acquitted.²

Thomas's case affords an instance of the meaning of the word "promise," as it affects a confession. The prisoner asked

¹ The words of the learned judge (Bayley, J.) who tried the case.

² So in *Green's case*, 6 Carrington & Payne, 656, where the prisoner, before making the confession, said: "If his handcuffs were taken off he would tell." It was remarked by Taunton, J., that he believed no one ever made a confession voluntarily without proposing to himself some advantage.

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the witness whether it would be better for him to confess? He replied "it would be better for him not to confess, but that the prisoner might say what he had to say to him, for it should go no further." The prisoner then made a statement. The prisoner's counsel objected that this statement had been obtained under a promise. Coleridge, J., admitted the confession in evidence, and the prisoner was found guilty. The learned judge said, that the only proper question, whether the inducement held out to the prisoner was calculated to make his confession an untrue one, and he thought that what was said by the witness to the prisoner had a contrary tendency. 6 Carrington & Payne, 353.

In *Shaw's case*, 6 Carrington & Payne, 372, after the prisoner had been committed, another prisoner said to him, "I wish you would tell me how you murdered the boy; pray, split." So, in the same case, the witness had taken an oath, that he would not tell what the prisoner would say, whereupon the prisoner confessed. Patteson, J., admitted the confession, as no inducement was held out, that it would be better for him to confess.

In none of these cases was any promise made in reference to the escape of the party from the charge against him, or calculated to induce him to say what was untrue. In the two latter cases, the promise was not held out by a person in office or authority over the prisoner, and, upon that ground, which however was not taken by the court, the confession was, as it will be seen hereafter, admissible. See the next proposition.

In *Court's case*, 7 Carrington & Payne, 486, it was proposed to give in evidence the examination of the prisoner before the committing magistrate, who said: "No inducement was held out to the prisoner to confess. The prosecutor said, in the prisoner's presence, that he considered him to be the tool of another person. I then told the prisoner to be sure to tell the truth. He then made the statement." Littledale, J., received the evidence, and observed that it could hardly be said that telling a man to be sure to speak the truth is advising him to confess what he is

really not guilty of. The object of the rule relating to the exclusion of confessions, is to exclude all confessions which may have been procured by the prisoner's being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. See *Enoch's case*, 5 Carrington & Payne, 539, cited ante, p. 187.

Where the defendant, being in custody on a charge of setting fire to her master's farm-building, her master's married daughter said to her, "I am very sorry for you; you ought to have known better; tell me the truth, whether you did it or no;" the defendant replied, "I am innocent;" whereupon the other said, "Don't run your soul into more sin, but tell the truth." A confession thereupon made by the defendant was held admissible, as there was no threat or inducement. *Regina v. Sleeman*, 1 Dearsly, C. C. 269; 6 Cox, C. C. 245; 22 Eng. Law and Eq. Rep. 606.

In the case of *Rez v. Harris*, 1 Moody, C. C. 341, (tried in 1832,) where the admissibility of a parol confession was reserved, upon other grounds, for the opinion of the twelve judges, one of the prisoners said to Evans, (also a prisoner,) in the presence of the magistrate, and when the examinations were about to be taken: "Speak the truth; you may as well speak the truth as not." Evans then made a statement, which was taken down by the magistrate, and received by Littledale, J., in evidence. It appeared that immediately previous to these words being said to the prisoner, the magistrate had said to him, "You are not obliged to say any thing; there is no compulsion."

In *Nolan's case*, 1 Crawford & Dix, C. C. 74, a constable told the prisoner that his father had been charged with the murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the crime but himself, and then made a confession. Doherty, C. J., having conferred with Torrens, J., admitted the confession, observing, that although such announcement was likely to act upon the feelings of the prisoner, he would not

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be warranted, on that ground, in refusing to receive it.

In *Cain's case*, 1 Crawford & Dix, C. C. 37, where the prisoner was indicted for concealing the birth of her child, a medical witness said he examined the prisoner in custody, and found that her breasts were full of milk; that he asked her whether she had not recently had a child, and added that if she refused to tell, he would examine her person more closely; the prisoner then said: "It is unnecessary to examine me, for I had a child." Torrens, J., admitted this confession, on the ground that the witness was endeavoring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes admissions. See this case further, post, § xi.

In *Wright's case*, 1 Lewin, C. C. 48, (1830,) the magistrate told the prisoner, on his being brought up for examination, that "his wife had already confessed the whole, and that there was quite enough against him to send a bill before a grand jury." He then asked him what he had to say? The prisoner confessed. The admission of this confession was objected to. Parke, J., admitted it, observing that "what the magistrate said was rather a caution than a menace."

There is an earlier case of *Rex v. Sexton*, Chetwynd's Supplement to Burn, title Confession, decided in 1822, which appears irreconcilable with the law as above stated, but the authority of that case has been questioned. 1 Deacon, Crim. Law,

424, 427; Roscoe, Crim. Ev. 37; 2 Russell, Crim. Law, (3d ed.) 827, note. It differs from other cases in this circumstance, that the offer to confess came, in the first instance, from the prisoner himself. The prisoner said to the constable, "If you will give me a glass of gin, I will tell you all about it." The officer gave the prisoner two glasses of gin, and read over the confession, thus obtained, to the prisoner, in presence of a magistrate, who told him that the offence with which he was charged affected his life, and a confession might do him harm. The prisoner said, that what had been read over was true, and signed the paper. Best, J., considered both confessions inadmissible: That "the second confession would have been admissible, if the magistrate had told the prisoner, that what he had previously said to the officer could not be given in evidence against him, but, for want of this information, he might think that he could not make his case worse than he had already made it, and under this impression, might have signed the confession before the magistrate."

As to the latter ground and the rejection of the second confession, this case has not been followed by recent cases;¹ and the rejection of the first confession, which was made to the constable, is not supported by subsequent authorities. Even if the liquor given is sufficient to intoxicate the prisoner, and where it is imputed that it was given for that purpose, it has been held (*Spilsbury's case*, 7 Carrington & Payne, 187, per Coleridge, J.,²) that a statement made by a prisoner, under such

¹ See *Hoves's case*, 6 Carrington & Payne, 404. The prisoner was told by the magistrate, that confessing would do him no good; but he did not tell him that his former confession to the constable would have no effect, or that it could not be given in evidence against him. Denman, C. J., admitted the confession. See also *Lingate's case*, Philipps on Ev. 430, coram Bayley, J.

² So in *Vaughan's case*, Foster, 240, 5 State Trials, S. C., for high treason, before Holt, C. J., Treby, C. J., Ward, C. B., &c., a statement by the prisoner of a material fact, relating to the principal question of doubt in the case, whether the prisoner was a subject of the king of England, was admitted in evidence after argument, although it appeared on cross-examination that it was made on the night the prisoner was arrested, and when he was not sober. Upon the next morning, he positively denied the fact on his examination before the magistrate.

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circumstances, is not therefore inadmissible. It must either be obtained by hope or fear. The circumstance of his being intoxicated is matter only of observation by the judge upon the weight that ought to attach to this statement when it is considered by a jury. It seems a violent presumption, that two glasses of gin would induce a prisoner untruly to charge himself with a capital felony. The decision is the more remarkable, as the offer to confess came, in the first instance, from the prisoner. There was no promise in respect of the prisoner's escape from the charge, or his being let out of custody. The principle, as is remarked by a modern text-writer, (1 Deacon, *Crim. Law*, p. 424, note,) in which a confession is inadmissible, is not, because it is induced by some temporary indulgence to the prisoner, but because it is extracted by some promise of forgiveness, and the hopes of escaping from punishment. The promise, therefore, made by the officer on this occasion, seems more to have affected his credit as a witness, than to have been such as wholly to exclude the evidence. The only proper question, as Mr. Justice Coleridge remarks, in a case already cited, (*Rex v. Thomas*, 7 Carrington & Payne, 346,) is, whether the inducement held out to the prisoner is calculated to make his confession an untrue one. So Mr. Justice Littledale remarks in another case, *Rex v. Court*, 7 Carrington & Payne, 487. "The object of the rule, relating to the exclusion of confessions, is to exclude all confessions which may have been procured by the prisoner being led to suppose, that it will be better for him to admit himself to be guilty of an offence, which he really never committed."

But the remarks of Best, J., in regard to the first confession, may, perhaps, be deemed extra-judicial, as there was another ground on which the learned judge dwelt at greater length, and on which the confession was rejected, a circumstance not generally alluded to in the text-books. The confession was not taken down by the officer from the lips of the prisoner, but written down from recollection, after he left the prisoner. The learned judge ac-

cordingly said: "We have not the confession of the prisoner. We have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words — nothing, that he says, that has any relation to the subject, being omitted, or any thing added, (but as to this remark, see post, *Harris's case*, 1 Moody, C. C. 341,) except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language, a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower order of men have but few words to convey their meaning; and they know as little of expressions, that they are not in the habit of using, as if they belonged to another language. I will not receive this paper in evidence; and I hope that I shall not find a police officer again employed in preparing, either the depositions of witnesses, or the confessions of prisoners." Alderson, counsel for the prosecution, said, that Dallas, C. J., had refused to receive, at a former assize at Norwich, a confession, because it was not in the prisoner's own words. MS. cited in Chetwynd's Supplement to Burn's Justice, title, Confession, p. 103.

A well-known writer on the law of evidence, as administered in English courts of justice, remarks, "that the cases are probably rare in which unfounded self-accusations occur, or, at least, where a jury would be misled by them; and certainly the rule occasions, in a multitude of instances, the escape of the guilty. There is a general feeling, which seems to be well-founded, that the rule has been ex-

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tended much too far, and been applied in some cases where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the strong and universal motive of self-preservation." *Phillips on Ev.* 424.

The Scotch law is much less scrupulous on this subject. In a work of high character, on the Practice of the Criminal Law of Scotland, it is said, that confessions are received in evidence, or rejected as inadmissible, according as they are or are not entitled to credit. A free and voluntary one is entitled to the highest credit, and therefore it is admitted as proof; but where a confession is extorted by fear, or elicited by promises, it comes in a much more questionable shape; still it is admissible by our practice, leaving its credit to be observed on to the jury by the counsel for the prisoner, if it was given under circumstances which throw a doubt upon its credibility. In strong cases of undue influence it should be altogether set aside; where the evidence of that taint is not so strong, it should be received, reserving its credibility for the jury, who, if they do not deem it worthy of credit, will attach no weight to it whatever.

If a verbal confession has been made, even on a promise of safety or protection from the injured party, or any one else, except the public prosecutor, or those acting for him, it may, in public prosecutions, be proved against the pannel, reserving its weight and credibility for the jury. The objection usually urged against verbal confessions is, that they were made under a promise of safety by some one whom the prisoner was entitled to consider as having a title to interfere in the matter. Thus, nothing is more common than for a prisoner to confess (upon an understanding, express or implied,) to the party injured, that he is not to be prosecuted; and this pledge he finds himself unable to redeem when the case comes to be insisted on by the public authorities. In such cases the rule is, that if the public prosecutor, or any person identified with him, as the procurator fiscal, sheriff, clerk of court, or the like, have given assurance

of protection, the confession cannot be given in evidence; but that if the private party only, or an officious third person, as a constable or sheriff officer, or the like, has given such assurance, it cannot exclude the proof of such confession, however much and justly it may weaken its weight with the jury. The principle on which this is founded, is the same as that which lies at the bottom of all our rules on the subject—namely, that it is not in the power of a private party, by any promises or indiscretions on his part, to tie up the hands, or restrain the proof of the public prosecutor. By so doing he may limit or restrain himself, but he cannot affect those to whom the public administration of criminal justice is intrusted.

In England it is held that a confession, though extra-judicial, if duly proved, is of itself, without the aid of any additional circumstance, sufficient to warrant the conviction of a prisoner. This being the strong and decisive effect which they give to a confession, it is justly held by them that such a confession, to be admissible, must be proved to have been freely and voluntarily made; and that it becomes inadmissible if it is tainted by any promises of pardon or application of threats. But the case is widely different in this country, where no such effect is given to a confession, how deliberately and solemnly soever it may have been made, but is only admitted as an article of evidence, to be taken into consideration with the other proof in determining on the guilt of the prisoner. When such is the law, it is reasonable that every confession, if proved by credible evidence, should be received against the prisoner; provided always, that it was not elicited by fraudulent or deceitful promises on the part of the prosecutor; and such accordingly is the law of Scotland. It is not to be imagined, however, from this circumstance, that every confession of a prisoner is to have equal weight with a jury, or that they are not entitled, and indeed bound, to take into account all the circumstances under which it was given, and to give little weight to it, or throw it out of view altogether, according as these circumstances

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appear to incline less or more against the admissions. 2 Alison's Crim. Law of Scotland, 581, 582.

SECTION II. A confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a person not in authority over the prisoner.

In *Spencer's case*, 7 Carrington & Payne, 776, (1837,) Parke, B., said, there was a difference of opinion amongst the judges upon this point; but in a subsequent case of *Regina v. Sarah Taylor*, 8 Carrington & Payne, 734, (1839,) in which *Spencer's case* was cited, Patteson, J., said: "It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in the same case, that learned judge said, that he would have received in evidence the statement made by the prisoner, to one who was not the prosecutor nor a constable, nor in office nor authority, but who had said to the prisoner, 'you had better tell how you did it,' if the inducement had been held out by such person alone." In that case the prosecutor's wife, who was also the mistress of the prisoner, having been present on the occasion, the learned judge held, that as she expressed no dissent, she must be taken to have sanctioned the inducement, and the statement was therefore excluded. The cases of *Rex v. Dunn*, and *Rex v. Slaughter*, 4 Carrington & Payne, 543, 544, in which Bosanquet, J., held, that "any person telling a prisoner that it will be better for him to confess, will always exclude a confession made to that person," were both cited on this occasion.

In *Dunn's case*, the witness, to whom the prisoner wished to sell the book, which he was indicted for stealing, told him, "he had better tell where he got it." In *Slaughter's case*, the confession was made

by the prisoner to his fellow workman, who told him "it would be better for him to confess." But now that the opinion of the judges has been expressed, as stated by Patteson, J., in *Sarah Taylor's case*, it seems that the opinion of Bosanquet, J., in the last two cited cases, cannot be considered law.¹ See *The State v. Potter*, 18 Connecticut, 166, 179.

Row's case, which was brought before the judges in 1809, Russell & Ryan, C. C. 153, is the leading case upon the admissibility of a confession made to a person not in authority. Whilst the constable had some of the goods which were stolen, and the prisoner in his custody to take to the Guildhall before the magistrates, some of the neighbors, who had nothing to do with the apprehension, prosecution, or examination of the prisoner, officiously interfered and admonished the prisoner "to tell the truth, and consider his family," which was a large one. No answer or observation thereon was made by the constable, nor did the prisoner answer them; but he desired the constable to call upon him in an hour at the prison, which he did, and there the prisoner made a full confession. Chambre, J., received this confession in evidence. The question was brought before the judges. Nine were present, Ellenborough, C. J., Mansfield, C. J., C. B., Macdonald, C. B., Heath, J., Grose, J., Lawrence, J., Le Blanc, J., Chambre, J. They agreed that the evidence was admissible and the conviction right; "because the advice to confess was not given or sanctioned by any person who had any concern in the business."

In *Gibbons's case* the witness, who was attending the prisoner in the capacity of a surgeon, stated that he held out no threat or promise to induce the prisoner to confess; but that a woman, who was present, said she had told the prisoner she had better tell all, and then the prisoner

¹ The same might probably be said of the opinion of Parke, J., after conferring with Littledale, J., as reported in *Kingston's case*, 4 Carrington & Payne, 387, where the inducement was held out by a surgeon who was called in to attend the prosecutrix, to whom poison had been administered — unless a person in that character can be considered a person in authority, or unless the inducement was held out in the presence, and therefore, under the implied sanction of the prosecutrix, which does not appear in the very short report of the case.

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made the confession to the witness. Park, J., after consulting with Hullock, B., laid down, "that as no inducement had been held out by the witness, to whom the confession was made; and the only inducement had been held out, as was alleged, by a person having no sort of authority, it must be presumed that the confession to the witness was a free and voluntary confession. If the promise had been held out by any person having any office or authority, as the prosecutor, constable, etc., the case would be different; but here some person, having no authority of any sort, officiously says, you had better confess. No confession follows; but some time afterwards, to another person, the witness, the prisoner, without any inducement held out, confesses. They (the judges) had not the least doubt that the present evidence was admissible." The prisoner was acquitted on other grounds. 1 Carrington & Payne, 97, coram Park, J.

So in *Hardwick's case*, before Wood, B., in 1811, a confession made before a magistrate was objected to on the ground that the wife of the constable had told the prisoner previously that he had better confess. The learned judge admitted the confession. This, it would seem, must have been on the ground that the constable's wife was not a person having authority. 1 Carrington & Payne, 98, in note.

So in *Tyler's case*, 1 Carrington & Payne, 129, tried before Hullock, B., in 1823, a confession made by one of the prisoners to a constable, was tendered in evidence; it was objected to by the prisoner's counsel, who wished to show that the prisoner, being locked up alone in a room at a public-house, was told by a man that the other prisoner had told all, and he had better do the same, to save his neck; and that, on this, the prisoner confessed. What appeared in evidence, however, was, that the prisoner said that "a man had told him he had better tell all, for the other prisoner had confessed, but that he would not say a word, for he came too far north." Hullock, B., held that as the promise, if any, was by a person wholly without authority, the subsequent confession to the constable, who had held

out no inducement, must be considered as voluntary. It was admitted, and the prisoner was found guilty.

It is true that in these cases the confession was not made to the person who held out the inducement, which has been said to make a distinction. Note to *Gibbons's case*, 1 Carrington & Payne, 98.

But the ground upon which the judges put their decision in *Row's case*, Russell & Ryan, C. C. 153, is not that the confession was made to one person, and the inducement held out by another, but on the ground that the advice to confess was not given or sanctioned by any person who had any concern in the business.

The question is, was the confession procured by an inducement which led the prisoner to suppose that it would be better for him to admit himself to be guilty of an offence which he did not commit. Per Littledale, J., 7 Carrington & Payne, 487. If the inducement was so calculated, it would seem that the influence so produced would continue upon the mind of the prisoner, and so render inadmissible a confession made to another person, present when the inducement was made, and within an hour after such inducement held out, as was the fact in *Row's case*.

In a note to a recent edition of a popular text-book, the cases of *Rex v. Upchurch*, and *Rex v. Simpson*, 1 Moody, C. C. 410, 465, are cited, as if they were authorities for rejecting a confession, although the inducement is held out by a person not in authority, the word authority being applied to parties having power over the prisoner, as masters, etc. Dickinson's Quarter Sessions, by Sergeant Talford, (1841,) 525, note (p.) See also Phillpotts on Ev. (8th ed.) 429. But it would appear, that in both these cases the inducement was held out by, or with the sanction of, a person in authority. See pp. 184, 186, ante.

In *Berigan's case*, 1 Irish Circ. R. 177, (Cork Lent Assizes, 1841,) the prisoner who, with several others, was indicted for a burglary and larceny, had sent the Bridewell-keeper to a magistrate, to tell him he had something to communicate to him. The magistrate acted at this inter-

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view with great caution, and warned the prisoner not to say any thing that would criminate himself, as what he said would be taken down in writing, and made use of against him on his trial. The prisoner replied, he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person charged with the same crime, who had confessed and been admitted Queen's evidence; that the prisoner was aware of this; that it was to that he alluded when he said, that he knew that the witness knew all; and that it was from the statement made by the person who had been admitted Queen's evidence, that the prisoner was examined and his confession taken down. It was insisted that, under these circumstances, the confession was not admissible, as the caution, given by the magistrate, did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to imagine, that if he made a confession, he would be put in the same situation with the other person who had done so.

Crampton, J., after a lengthened argument, received the confession, observing that the magistrate stated, that as far as he knew, the prisoner came forward voluntarily; that a mere formal caution of a magistrate would not be sufficient to set up a confession, if it appears that such confession was made under the distinct impression of a previous promise or threat, but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was, in effect, telling the prisoner that he would get no benefit from his confession, and that he should, consequently, dismiss from his mind all

expectation of getting any, if any such he had.

In the above case there were similar confessions made by all the prisoners, under circumstances precisely similar. They were accordingly admitted. The prisoner was found guilty. It is not improbable that, in this case, the prisoner was induced to make the confession, by what his fellow prisoner had done, and by his having been admitted as Queen's evidence, but no promise, threat, or inducement was held out by any person in authority, "calculated to make his confession untrue." Per Coleridge, J., *Thomas's case*, 7 Carlington & Payne, 346.

The law, in this respect, is stated in modern text-books in terms which seem at variance with the preceding authorities. Thus in a recent Treatise on the Law of Evidence, (2 Starkie, 36, ed. 1842,) it is stated that a confession can never be received in evidence where the defendant has been influenced by any threat or promise.¹ The learned writer makes no distinction between inducements by persons in authority and by persons not in authority. In support of this proposition he cites *Warickshall's case*, 1 Leach, C. C. (4th ed.) 263; Cowper, 334; and 2 Hawkins, P. C. ch. 46.

But in *Warickshall's case*, at the Old Bailey, in 1783, coram Nares, J., present Eyre, B., the confession was made after promises of favor held out by the prosecutor, a person in authority; and the remarks of the court must be understood accordingly. This case, therefore, does not appear to support the proposition.

In the case cited by Mr. Starkie from Cowper, 334, *Rex v. Rudd*, Lord Mansfield says: "The instance has frequently happened of persons having made confessions under threats or promises. The consequence, as frequently has been, that such examination and confessions have not been made use of against them on their trial." But this observation of the

¹ It is remarkable, that this work, though published in the year 1842, refers to but few of the cases on the law of Confessions, decided since the year 1834. See an able review of this work in *The London Law Magazine*, Vol. 27, p. 152.

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learned judge must be understood *secundum subjectam materiem*; it was made in a case, where the counsel for the defendant moved to have his client bailed, on the ground of her having been admitted and examined as a king's evidence by three magistrates — all persons in authority — “under the faith and confidence she reposed in them; and, taking it for granted they were perfectly acquainted with the duty of their office,” when she “made a disclosure of every thing she knew.”

This case then falls strictly within the rule as already submitted, where the inducement is held out by a person in office or authority.

Neither will Hawkins be found to sanction the proposition in question. In a note in the sixth, and, perhaps, in an earlier edition, but which does not form part of the original text, and is not found in the folio edition, it is laid down, in reference to “a confession of the defendant, taken by the common law, upon an examination before the Secretary of State, or other magistrates, for treason or other crimes,” that “the identity of these examinations must be proved at the trial before they can be read in evidence, (Summary, 263,) and if they are not proved, they cannot be admitted orally, for a confession being the strongest proof of guilt, requires the highest authenticity, (O. B. 1785, 861,) and this confession must be without menace or undue terror. 2 Hale, P. C. 285.” The writer of this note is speaking of a confession made before magistrates, or persons in authority; and the passage in Hale, referred to, is equally restricted. It occurs in the Pleas of the Crown, 2, ch. 38, p. 284. In reference to examinations of the person accused, and informations against him, it is said, “but then, as to the examination of the prisoner, it must be testified that he did it freely, without any menace or undue terror imposed upon him; for I have often known the prisoner disown his confession upon his examination, and he hath sometimes been acquitted against such his confession; and the reason why these examinations and informations are allowable in evidence, under the cautions above pre-

mised is, because they are judges of record, etc., and the informations before them upon oath are authorized and required by act of Parliament, and they are judges of the crimes upon which informations are taken.”

I have given the whole passage, although it is conversant about informations taken against, as well as confessions, made by a prisoner, to show that the proposition in Hale is not any more than that in Cowper, or in the note to Hawkins, an authority for the proposition laid down by Mr. Starkie, nor opposed to the qualified rule above submitted.

It is stated, without qualification, in a modern edition of Hawkins, that “the human mind, under the pressure of calamity, is easily seduced, and is liable in the alarm of danger to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession therefore,” it is said, “whether made upon an official examination, or in discourse with private persons, which is obtained from the defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, (O. B. 1786, p. 387,) is not admissible evidence; for the law will not suffer the prisoner to be made the deluded instrument of his own conviction.”

This is not any part of the text of Hawkins, but is introduced into the margin of some of the later editions. It is also found in one of the later editions of Gilbert on Evidence, and was probably inserted by the editor, Lofft. It is not found in the early editions; and it is said that, “upon search in the Old Bailey papers, as above cited, the passage in terms is not found, though the words may have been used by Sergeant Adair, who tried the case referred to.” In *Gilham's case*, before the judges, 1 Moody, C. C. 194.

Mr. Justice Parke has said, as cited, 1 Phillipps on Ev. 424, (8th ed.) in note, that “the doctrine of inducements has been carried to the verge of common sense;” and unless a line is drawn, confining the effect of alleged inducements to those held out by persons in authority, it would seem

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that the doctrine must become wholly indefinite, and depend upon the moral opinion of each individual judge, rather than on a uniform and settled rule of law.

In *Hall's case* a witness was produced, who said that the prisoner Hall had desired him to apply to the justice to admit him as a witness for the Crown; for "that he had not entered the house, but had only stood at the door, while the other two prisoners went up stairs to commit the felony." It was objected, that as this confession was made with a view, and under the hope of being thereby permitted to turn King's evidence, it was not admissible against the prisoners, and the learned judge held that this was not a voluntary confession, and rejected the testimony. 2 Leach, C. C. 559, (ed. 1815,) in a note, coram Adair, Sergeant. Stafford Spring Assizes, 1790.

This case is very briefly reported in a note of the editor to *Lambe's case*. It does not appear whether the statement made by the prisoner was induced by a hope held out that he would be admitted King's evidence; nor does the character of the person, to whom the confession was made, appear. The prisoner stated the facts at the same time that he desired the witness to apply to have him admitted king's evidence. The confession became immaterial, as a subsequent confession before the magistrates was given in evidence, on which the prisoner was convicted, and the judges held the conviction right.

But this case seems to be overruled. It has been decided, that if a prisoner makes a confession with the hope, held out by a person *not in authority*, that he will thereby be admitted as Queen's evidence, the confession will be received against him. *Regina v. Berigan*, Irish Cir. Rep. 177, per Crampton, J. And the same result will follow, though his hopes have been

excited by a constable or other officer, if on the trial of his accomplices he refuses to make a full disclosure, and thus violates the condition on which his claim to favor can alone rest. *Commonwealth v. Knapp*, 10 Pickering, 491-495, (1830,) where this point is fully discussed. See also *Regina v. Boswell*, Carrington & Marshman, 584.

In *Thompson's case*, 1 Leach, C. C. (ed. 1815,) 291, Hotham, B., said: "I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject; and under the present circumstances the prisoner's confession, if it was one, ought not to be received." But in this case the inducement was held out by the prosecutor, the receiver-general for the county, who had apprehended the prisoner, and taken him to his house, where the alleged confession was made. The words which the witness had used to the prisoner were, "Unless you give me a more satisfactory account, I shall take you before a magistrate."

So in *Cass's case*, 1 Leach, C. C. (ed. 1815,) 293, note, where the only evidence was an alleged confession, Gould, J., told the jury they must acquit the prisoner; that the slightest hopes of mercy held out to induce him to disclose the fact was sufficient to invalidate a confession. But these remarks must be taken *secundum subjectam materiem*. The prosecutor, in the presence of a constable, who was taking the prisoner to a magistrate, said to the prisoner, "I am in great distress about my irons; if you will tell me where they are, I will be favorable to you."¹

In regard to the proposition stated in this section, Professor Greenleaf says: "Mr. Joy maintains the *unqualified* proposition that 'a confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a

¹ In a note to the second volume of Sir Gregory Lewin's Crown Cases, 125, the learned editor, after referring to some of the leading cases upon the subject, rightly concludes "that the cases seem to establish the principle that where a confession is obtained through the medium of a suggestion, made by a person from whom the prisoner can have nothing to hope or fear, it ought to be received."

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person not in authority over the prisoner,' and it is strongly supported by the authorities he cites, which are also cited in this section. See Joy on Confessions, sec. 2, p. 23-33. His work has been published since the first edition of this book, but upon a deliberate revision of the point, I have concluded to leave it, where the learned judges have stated it to stand, as one on which they were divided in opinion." 1 Greenleaf, Ev. § 223, note.

In South Carolina, it has been held, that where the prisoner, after due warning of all the consequences, and the allowance of sufficient time for reflection, confesses his guilt to a private person, who has no control over his person or the prosecution, the confession is admissible in evidence, although the person may have ability and influence to aid him. *The State v. Kirby*, 1 Strobhart, 153, (1846.) In delivering the opinion of the court, Evans, J., said: "But where the confessions are made on inducements held out by private persons having no authority over the prisoner or the prosecution, there seems to be no satisfactory conclusion to be drawn from the authority of decided cases, so as to lay down any definite rule which can be applied to the almost infinite variety of cases which occur. The same difficulty does not exist where the confessions are made to one in authority. There, it is true, the rule may sometimes fail of meeting the truth on account of the difference in age, experience, and self-possession, in the midst of the most trying and difficult position in which man can be placed; yet in general, it has been found to be a wise rule which excludes confessions made to such persons; and as it is always wise to narrow the bounds of discretion, whenever it is practicable, it has been adopted as a rule. But in the case of confessions made on suggestions of benefits, by private persons having no authority, the difficulty of laying down a more specific rule than the general one, that the confession must be voluntary, has suggested the idea that the question is a mixed one of law and fact, and that it must be left in a great degree to the judge to decide under all the circumstances, whether the threats or induce-

ments were such as to overcome the mind of the prisoner. 1 Greenleaf, Ev. § 223. That seems to be the result to which the more modern cases lead; and a late writer on the subject has come to the conclusion, that a confession made to a private person under inducements held out by him, is admissible. Joy on the Admissibility of Confessions, § 2."

SECTION III. A confession is admissible, although it is elicited by questions put to a prisoner by a magistrate, constable, or other person.

The leading authority upon this is *Wild's case*, which came before the judges of England on a case reserved. 1 Moody, C. C. (1835,) 452. It is very briefly noticed in the books on evidence, and as it is a leading case, and appears to have been overlooked in two recent cases, it is given here at some length.

The prisoner was tried for the murder of Elizabeth Smith, by drowning her in a pit filled with water. He was a boy about fourteen years old. Elizabeth and her sister Martha, one three years old, the other one, were both drowned. The prisoner was taken into custody by a person not a constable; and while in the inn, to which he had been taken, several neighbors were in the room and asked him questions about the children.

A witness gave the following evidence: "I told the prisoner to kneel down and tell the truth. I was present when he was taken up. Neither I nor the person who arrested him are constables. That person took him into the parlor and began to question him how the children came to get into the pit; whether they fell or were put in? He said he should not tell them any thing about it. The person who arrested him, asked him if he would tell any one else, if he would go out of the parlor? The prisoner said nothing. The other then went out. I said to the prisoner, now, kneel you down by the side of me and tell me the truth. He did kneel down. I said I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty. I then said, Did these

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children fall into the pit? I heard him say something. He said he pushed one in with one foot and the other with the other, but not purposely. A third person asked him if he had any malice or revenge? He said no."

At a meeting of all the judges in Michaelmas Term, 1835, except Denman, C. J., Vaughan, J., Bolland, B., and Bosanquet, J., they held unanimously that the confession was strictly admissible; but they much disapproved of the mode in which it was obtained. The prisoner was transported for life.

In this case there was no caution given; the statement was elicited by questions, and those questions were put by an unauthorized person.

In *Thornton's case*, which came before the judges, 1 Moody, C. C. 27, (1824,) a confession was held admissible, made by a boy, only fourteen years old, to a chief officer of police, by whose directions he had been apprehended without a warrant, and obtained in answer to questions put to him by the officer, and at a time when the boy had been without food for nearly an entire day. This is a very strong case. The officer had ordered the prisoner to Bridewell of his own authority; and soon after said to him, that "in consequence of the falsehoods he had told and the prevarications he had made, there was no doubt but he had set the premises on fire;" and he asked him "if any person had been concerned with him or had induced him to do it." The prisoner said he had not done it. The officer replied, "he would not have told so many falsehoods if he had not been concerned in it; and he again asked him if any one had induced him to do it?" The boy then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made.

Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal,¹ and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the judges. Seven judges held the confession rightly received, on the ground that no threat or promise had been used. Best, C. J., Bayley, J., and Holroyd, J., were of a contrary opinion.

It does not appear that the prisoner was cautioned in any way. The statement was elicited by a police officer, and by interrogatories, and those interrogatories put in a manner, and under circumstances, which would seem calculated to intimidate so young a boy, in such a feeble state of body, as he must have been at the time from want of food.¹

In *Gibney's case*, Jebb, C. C. 15, in which the twelve judges of Ireland, in 1822, held unanimously that the confession was admissible, it was elicited by questions put by two constables, in whose custody the prisoner then was on his way to gaol. One asked him, "Did you kill the child?" the other, "Were you not a terrible man to do such a thing?" Both these questions were asked before the confession was made. The constables told him several times before he confessed, what a terrible offence he had committed — that it was a terrible thing for a man to murder his own child.

In *Upchurch's case*, 1 Moody, C. C. 465, the confession was made in answer to questions put by the mistress of the prisoner; but this does not appear to have been considered an objection to its admissibility in evidence, either by the prisoner's counsel or by the learned judge, (Parke, J.,) who tried the case.²

In *Kerr's case*, 8 Carrington & Payne, 179, (1837,) it appeared that a policeman

¹ At the same assizes at which *Thornton's case* was tried, Holroyd, J., held, that the mere fact of a confession being made by a prisoner while in unlawful custody, rendered it unavailing. *Ackroyd and Warburton's case*, 1 Lewin, C. C. 49. In *Thornton's case*, supposing the custody to have been illegal, the officer had a direct interest in eliciting a confession from the prisoner, to give him an excuse for the apprehension or detainer of the party.

² Rejected on another ground, p. 184.

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had put questions to the prisoner, a female, and had given her no caution that her answers would be used in evidence against her. The confession was admitted, and the prisoner was found guilty. Parke, J., said that there did not appear to have been any thing improper in the conduct of the policeman; though, treating it as a general question, it was better that it should not be done, and that he would not, if placed in such a situation, put a question to a prisoner without a previous caution. The counsel for the prisoner, although he animadverted in strong terms, when addressing the jury upon the impropriety of questions being so put by a policeman, and argued that the practice was objectionable, as the questions were put by persons for the most part uneducated, and at a time when the party, to whom they were put, was in a state of confusion and alarm at being charged with an act of felony, did not contend that the evidence was not strictly admissible, or that the court could reject it upon that ground.

In a recent case, upon one of the Irish circuits, *Regina v. Francis Hughes*, Armagh Spring Assizes, 1842, coram Crampton, J., the case of *Regina v. Patrick Hughes and Margaret Hughes* was cited, 1 Crawford & Dix, C. C. 115, coram, Doherty, C. J., as opposed to the law above submitted. But the point decided in that case was only that the admission of the prisoner did not go to establish, that he was aware of the guilt of the person whom he was charged with harboring at the time when that person remained in his house. The observations of the learned judge, therefore, on the impropriety of an unauthorized person, without a previous caution, interrogating a prisoner with respect to his guilt or innocence, ought not, it would seem, to be cited as a decision upon the admissibility of a confession so obtained. Those remarks were extrajudicial, and may, perhaps, be understood in the sense in which Parke, J., in the case last cited, expressed his disapproval of police officers questioning a prisoner without a previous caution; and the twelve judges, in *Wild's case*, before cited, expressed their disapprobation of

the manner in which the confession was obtained. So Lord Denman, C. J., in a recent case, speaking of magistrates, says: "That before they receive a statement, they ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit." *Arnold's case*, 8 Carrington & Payne, 621.

It may be proper that the police authorities should forbid the practice of questioning a prisoner by a constable; and it might reasonably induce caution, and perhaps, suspicion, and a scrutinizing jealousy in jurors, in investigating the credit of a confession obtained by such person through such means; but the cases before the twelve judges, both in England and Ireland, already cited, seem to establish that statements made in answer to questions put, without any caution, and by a person who has no authority to question a prisoner, are admissible in evidence. Their admissibility is a question of law — it is not for the jury, but only for the court. See *Nute's case*, Chetwynd's ed. of Burn's Justice, cited post.

In a recent case upon one of the Irish circuits, *Regina v. Devlin*, 2 Crawford & Dix, C. C. 152, coram Burton, J., who consulted with Brady, C. B., where a prisoner was indicted for knowingly having in his possession copies of certain passwords of the Ribbon Societies, and a sub-inspector of police, who found the prisoner in custody in the police barrack, brought him to an out-house attached to the barrack and showed him the papers, and asked him whether he knew any thing about them — the statement of the prisoner was objected to, on the ground that it was in answer to an interrogatory put by an unauthorized person, and without any caution or warning. Burton, J., is reported to have refused to admit the evidence.

It may be remarked that in this case none of the English authorities appear to have been brought before the attention of that very learned and eminent judge. In a later case, *Regina v. Francis Hughes*, coram Crampton, J., Armagh Spring Assizes, 1842, where counsel for the pris-

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oner objected to a police constable being asked what statement the prisoner made to him when in custody, as it appeared that such statement was in reply to questions asked by the constable, which he had no authority to ask, and was not justified in asking, this case and *Margaret Hughes's case*, already mentioned, were cited in support of this objection. The learned judge, (Crampton, J.,) said, "he had frequently had occasion to decide this question; and all these cases had been before him. The confession of a man, to be admitted, is not to be extorted by fear nor educed by flattery; but where a prisoner voluntarily gives it, it may be received, whether the questions be put to him by an authorized or unauthorized person. Wherever the declaration is voluntary he would receive it; and that the doctrine in *Wild's case* was the true one."¹

It appeared afterwards that the statement was made in presence of a magistrate to questions asked by the constable, and that the magistrate expressly cautioned the prisoner. It was therefore unnecessary to decide the question; but the law, as stated by the learned judge, seems concurrent with the stream of authorities.

In *Regina v. Martin*, Armstrong, Macartney & Ogle, 197, (1841,) a policeman who arrested the defendant asked him at the time, "had he any of the things," alluding to the stolen articles. To this question the prisoner's counsel objected, and cited *Regina v. Devlin*, ubi supra. Burton, J., said: "In that case, the prisoner was asked as to his knowledge of passwords, an answer to which might, without more, have criminated himself under the provisions of the act of Parliament. Besides, there the prisoner was taken into a stable, and in that retired place, questioned. It is likely that a judge would come to the conclusion, that such conduct produced in the prisoner's mind a degree of fear that rendered his admission inadmissible against him." But

the authority of *Devlin's case* has recently been questioned. 1 Taylor on Ev. § 636, note (m).

In respect to confessions made to magistrates, the word "examination" in the act seems to imply, that the magistrate has a legal authority to put questions to the prisoner, as to the facts proved against him. *

The old act of Philip and Mary also required justices to take the examinations of prisoners. A contemporary writer, Lambard, shows how the law was understood shortly after the statute was passed, as he contrasts its harshness with the mild spirit of the common law. When referring to that statute, he says: "There also you may see, if I am not deceived, the time when the examination of the felon himself was first warranted by our law; for, at the common law, his fault was not to be wrung out of himself, but rather to be proved by others." Eirenarcha, ch. 21, 208. So Dalton, in his Country Justice, ed. 1635, folio, cap. 111, p. 299, says: "By the common law, *Nullus se ipsum tenetur prodere*; neither was a man's fault to be wrung out of himself, no, not by examination only, but to be proved by others, until the statute of 2 & 3 Ph. & M. ch. 10, gave authority to the justices of peace to examine the felon himself."

In *Rees's case*, 7 Carrington & Payne, 569, part of the prisoner's statement was made in answer to questions put to him by the magistrates; but it was afterwards read over to him, and he said it was correct. Lord Denman, C. J., received the evidence notwithstanding the objection.

In *Bartlett's case*, 7 Carrington & Payne, 832, on an indictment for murder, the examination of the prisoner before the magistrate was objected to, on the ground that it appeared as if some parts of it were in answer to questions put by the magistrate. Bolland, B., admitted the examination, saying, that it could not be rejected upon

¹ MS. from the short-hand notes of John Adair, Esq., barrister at law, who reported the case for the Crown. See also the opinion of the same learned judge, in *Regina v. Martin*, Armstrong, Macartney & Ogle, 198.

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that ground. The prisoner was found guilty.

So in an earlier case, *Rex v. Ellis*, Ryan & Moody, N. P. C. 432, tried in 1826, where part of the examination was elicited by questions put by the magistrate, and the prisoner's counsel objected to its admissibility, on this ground, and *Wilson's case* was cited, Holt's N. P. C. 597, where Richards, C. B., was reported to have refused to admit an examination obtained in a similar manner, Littledale, J., admitted the evidence; and referred to a case, at the Carlisle Spring Assizes, 1824, cited in Starkie on Evidence, in which Mr. Justice Holroyd had received it. And see 1 Greenleaf, Ev. (7th ed.) § 225, note.

SECTION IV. A confession is admissible, although it is elicited in answer to a question which assumes the prisoner's guilt, or is obtained by artifice or deception.

Thus in *Thornton's case*, 1 Moody, C. C. 28, a chief officer of police, by whose directions the prisoner had been apprehended, said to the prisoner in custody, that "from the falsehoods he had told, and the prevarications he had made, there was no doubt but that he had set the premises on fire;" and after questioning him whether any person had been concerned with him, added, "he would not have told so many falsehoods if he had not been concerned in it;" and again asked "whether any person had induced him to do it?" The prisoner then made a confession. Seven out of ten of the judges held that the confession was rightly received.

In *Burley's case*, the prisoner was told untruly, and as an artifice, when in gaol, that his accomplices were in custody. Upon hearing this, which was said to induce a confession, he confessed. The confession was admitted in evidence. Cited in Phillipps on Ev. 427, as having been decided in Easter Term, 1818; mentioned also by Roscoe and by Starkie, 2, 28, note m, (ed. 1824); 2, 13, note 3, (ed. 1842,) who says the conviction was afterwards approved of by the judges. It was also held in this case, that where a confession is made with the view and un-

der the hope of thereby being admitted King's evidence, and the party afterwards refuses to give evidence on the trial of his accomplices, he may be convicted upon such confession. 2 Starkie on Ev. 13, note 3, (ed. 1842.)

In another case before Littledale, J., Phillipps on Ev. 427, a constable, in order to extract a confession, assumed the prisoner's guilt, and asked her "how she came to poison her uncle?" The confession was received, and the prisoner was convicted.

In *Gibney's case*, Jebb, C. C. 15, already cited on another point, where the twelve judges of Ireland were unanimously of opinion that the confession was admissible, the expressions used by the constables to the prisoner, previous to the confession, seem to assume his guilt. One of them said, "you must be a very unhappy boy to have murdered your own child, if it be the case." Another said, "were you not a terrible man to do such a thing? What a terrible offence you have committed. It is a terrible thing for a man to murder his own child."

But in a recent case on one of the Irish circuits, *Regina v. Doyle*, coram Bushe, C. J., 1 Crawford & Dix, C. C. 396, (1840,) where a police constable stated that he visited the prisoner in gaol after her committal; that he cautioned her against saying any thing which might criminate herself, or be used for the purpose of convicting her; and, that after having done so, he said to her, "how did so much of your blue come into the child's stomach?" Bushe, C. J., refused to receive the confession in evidence.

It does not appear that any one of the preceding cases was brought before the attention of the court in this case, nor upon what ground the evidence was rejected, whether because the answer was elicited by a question put by a constable, or on the ground that the question assumed the prisoner's guilt. The learned judge is reported as having said, generally, that the prisoner's answer to this interrogatory, put by the person and in the manner proved, was not admissible against her. It is submitted, that this case is not

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law. See 1 Taylor on Ev. § 636, note (o.)

"No prisoner, as Lord Denman, C. J., remarks in *Arnold's case*, 8 Carrington & Payne, 622, ought to be entrapped into making a statement;" but where the confession is voluntary, and after a distinct caution from the officer not to say any thing which may criminate, or be used for the purpose of conviction, it would seem that there is no inducement held out to the prisoner to confess himself untruly guilty, which is the test of the admissibility or inadmissibility of a confession.

Mr. Phillpotts, in commenting upon a case, where evidence similar and stronger in degree was admitted, observes: "There was no reason to suppose, which is the main point to be considered, that the inducement held out was calculated to make the confession an untrue one." Phillpotts on Ev. 427.

SECTION V. A confession is admissible, although it does not appear that the prisoner was warned that what he said would be used against him, or although it appears that he was not so warned.

As to the examination of a prisoner by a magistrate, the statute does not require that it should appear upon the examination that the magistrate gave any caution to the witness, 9 Geo. 4, ch. 54, § 2;¹ and, if the prisoner has signed it, it is not necessary to produce, on the part of the prosecution, either the magistrate before whom it was taken, or the clerk who wrote it down, to state that a caution was given. Proof of the signature of the prisoner and of the magistrate is, strictly, sufficient. *Hopes's case*, 7 Carrington & Payne, 136, coram Vaughan and Patteson, JJ.; *Taylor's case*, Ibid. 138, coram Patteson, J.; *Rees's case*, Ibid. 569, coram Lord Denman, C. J.; *Foster's case*, 7 Carrington & Payne, 148, coram Alderson, B.; *Pikesley's case*, 9 Carrington & Payne, 124,

coram Parke, B. See also what Abbott, C. J., says in *Spencer's case*, 1 Carrington & Payne, 261, and 2 Russell, (2d ed.) 659. In *Foster's case*, 7 Carrington & Payne, 149, Bosanquet, J., and Alderson, B., said, in reference to Lord Hale's doctrine, 2 P. C. 52, 284, that it could not be intended that the magistrate or his clerk must be called, on account of their office; but that any one who could show that the examination was duly taken would be sufficient. Parke, B., in *Pikesley's case*, 9 Carrington & Payne, 124, (Nov. 1839,) says, in respect of depositions against a prisoner, "that in so serious a case" (the prisoner was indicted for an unnatural offence,) "it was very desirable the magistrate should be present, although, in point of law, it was not necessary."

In *Court's case*, 7 Carrington & Payne, 487, the magistrate, before whom the examination was taken, only said, he held out no inducement to the witness—he told him "to be sure to tell the truth." Littledale, J., received it in evidence.

So in confessions made to constables or others, it is not only unnecessary to prove, on the part of the prosecution, in order to render a confession admissible, that the prisoner was cautioned, or told that what he would say would be used in evidence against him; but such confession, if voluntary and free, is admissible, although it appears that he was not cautioned. *Thornton's case* and *Wild's case* before the judges, already cited, establish this.

In *Long's case*, 6 Carrington & Payne, 179, where the constable, on taking the prisoner, told her that "the charges were made against her by the accessory, and that there was a serious oath against her that she had set fire to the ricks," whereupon the prisoner made a statement, it is evident, from the report of the case, that no caution was given.

In *Richards's case*, 5 Carrington & Payne, 318, a confession was received,

¹ See also the form in Hayes's Digest of the Criminal Statute Law of Ireland, (ed. 1842,) 259.

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made to a constable without any caution, whilst he had the prisoner, a girl of about fifteen years of age, in his custody, and was taking her to a meeting of the magistrates, although an inducement to confess had been held out to the prisoner on the preceding evening by the prosecutrix.

In *Gibney's case*, Jebb, C. C. 15, 17, 18, 20, already cited on another point, it appeared that the constable, in answer to whose question the confession was elicited from the prisoner in custody, did not tell the prisoner that what he said he would give in evidence; nor was he told the consequences of such confession; and one of the constables said, in his examination on the trial, that he believed the prisoner was not aware that it would be given in evidence against him; but as neither threat nor hope was held out, the judges were unanimously of opinion that the confession was rightly received.

In the case of *Rez v. Magill*, on an indictment for felony, the confession, taken by a magistrate on an examination of the prisoner, was received, although the magistrate admitted he had not warned the prisoner of the legal consequences of making such statement. MacNally on Evidence, 38, Trin., Summer Assizes, 1799, coram Chamberlain, J. This case is referred to in Phillipps on Evidence. So in *Layell's case*, 8 Modern, 89; 16 Howell's State Trials, 215, cited in *Lambe's case*, 2 Leach, C. C. (4th ed.) 559, it does not appear that any caution was given to the prisoner before the Privy Council.

The practice of telling a prisoner not to say any thing to criminate himself, is not recognized by law. In *Arnold's case*, 8 Carrington & Payne, 622, Lord

Denman, C. J., says, "The frequent warnings given to prisoners not to say any thing that may criminate themselves renders it necessary for me to set right a prevalent error on this subject." The proper course of proceeding on the part of the magistrate is thus stated by Gurney, B., in *Greene's case*, 5 Carrington & Payne, 812: To dissuade a prisoner from confessing is wrong. He ought to be told that his confession will not operate at all in his favor; that he must not expect any favor because he makes a confession; that if any one has told him it will be better for him to confess, or worse if he does not, he must pay no attention to it; and that any thing he says to criminate himself will be used as evidence against him on his trial. After that admonition he ought to be left entirely to himself, whether he will make any statement or not; but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice.

So in *Arnold's case*, Lord Denman, C. J., says, a prisoner is not to be entrapped into making a statement; but when he is willing to make one, it is the duty of magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have been before on the prisoner's mind that that statement may be used for his own benefit; and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. 8 Carrington & Payne, 622.

An omission, however, in this respect, will not, as appears from the preceding cases, render a confession inadmissible.¹

¹ It is remarked in respect of the law of evidence as administered in England, and contrasted with that of other countries, that "those English justices of peace, who seem alarmed at the least chance of hearing truth from a culprit, and so earnestly entreat him to disclose nothing that can ever tend to bring guilt home to him, are rather to be admired for romantic generosity than for wisdom, or any beneficial consequences resulting from that conduct to the public. Innocence may be deprived of great advantages if deterred from promptly telling its own unvarnished tale. To keep back full information is, in some events, nearly equivalent to confessing guilt; and the warning, which prevents the story from being related at the earliest moment, may prevent it from producing at any time its just effect. But sup-

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SECTION VI. A confession is admissible, where it is induced by spiritual exhortation or persuasion to confess, not held out with any view of temporal benefit.

The case of *Rex v. Radford* seems at variance with this position. Coram Best, C. J. Exeter Summer Assizes, 1823, cited by Mr. Moody, (*ex relatione Cole-ridge*,) counsel for the prisoner, in *Gilham's case*, before the judges, 1 Moody, C. C. 197. It appeared that a clergyman had prevailed on the prisoner to confess, by dwelling on the heinousness of the crime with which he was charged, and the denunciations of Scripture against it, without giving him any caution that his confession would be used in evidence against him. The learned judge refused to allow the clergyman to state the confession, saying, that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and after the impression thus produced, to allow what he then said to be given in evidence against him.

This case was decided on the Western Circuit; but it is said, in argument,¹

that the case was not decided on the ground above stated, but that the learned judge thought it was, in that case, improper in the clergyman to violate the confidence reposed in him by the prisoner, and he expressed a strong opinion to that effect, and as the evidence was not wanted for the crown, it was not pressed, and the prisoner was convicted without it.²

It seems difficult to maintain this case on the ground first above stated, that, because "a confidence is created" between the clergyman and the prisoner, and because the prisoner "is thus thrown off his guard," his confession is not admissible in evidence. It has been held, that although a witness says to the prisoner, that the confession shall go no further, (*Thomas's case*, 7 Carrington & Payne, 345,) or even takes an oath that he will not mention what the prisoner says, (*Shaw's case*, 6 Carrington & Payne, 373,) and thus induces him to confess, this does not make the confession inadmissible, although a confidence is thus created in the mind of the prisoner, and he is thrown off his guard. See *Commonwealth v. Knapp*, 10 Pickering, 485, 491.

posing that the culprit, eager for his release, should choose to commit himself by falsehoods, or betray real facts, which go to his conviction, we cannot conceive that any harm is done. Between the opposite methods of compulsive interrogation and an indiscriminate injunction of silence, common sense suggests a middle course, which leaves the party to judge and act for himself. If he is blessed with self-command, and is in possession of the means of at once refuting his pursuers, why should his vindication be delayed? But as he may be incompetent to do so, or unprovided with the necessary proofs, let him be calmly told by the magistrate that no unfair inference will be drawn from his reserving his defence for a more convenient season."—*Edinburgh Review*, March, 1824.

¹ Sir William Webb Follett, in argument in support of the conviction in *Gilham's case*, 1 Moody, C. C. 202.

² In *Rex v. Sparkes*, on an indictment for a capital offence, tried by Buller on the Northern Circuit, the prisoner, a Roman Catholic, had made a confession before a Protestant clergyman, which was admitted in evidence on the trial, and the prisoner was convicted and executed. This case is cited by Garrow in *Dubarré v. Livette*, 1 Peake, N. P. C. 109, at Guildhall, 1791. Lord Kenyon, C. J., who tried the latter case, said that he should have passed before he admitted that evidence. In *Broad v. Pitt*, 3 Carrington & Payne, 519, Best, C. J., said, that the privilege of not disclosing communications, does not apply to clergymen; "but," he added, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence." This observation was, however, extra-judicial. The learned judge added further: "The case of privilege does not apply to clergymen since the decision the other day in *Gilham's case*;" Carr. Suppl. 61. *Quære*—Was this point decided in *Gilham's case*, 1 Moody, C. C. 197?

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The true question seems to be, does such confidence render it probable that the prisoner should be thus induced untruly to confess himself guilty of a crime of which he was innocent?

The object with which the law admits a confession in any case in evidence is to obtain truth. The only ground on which a confession is rejected is, that the circumstances under which it was obtained have a tendency to falsehood; and therefore the object with which it is admitted, instead of being secured, is likely to be frustrated. If any hope or fear acts upon the mind of a prisoner, and induces him to make an untrue confession, such confession is more likely to defeat than to secure the ends of justice. But if a confession flows, in the language of the court in *Warickshall's case*, 1 Leach, C. C. 263, (ed. 1815,) "from the strongest sense of guilt, it is admitted as proof of the crime to which it refers." It seems difficult to imagine that a man under spiritual convictions, and the influence of religious impressions, would therefore confess himself guilty of a crime of which he was not guilty; or that a man, under a strong sense of his spiritual relations with God, could hope to please God by a falsehood; that "a confidence created" between him and his pastor, or the "being thrown off his guard" by this confidence, should induce him—not to confess, (*that it might naturally do if he were guilty,*) but induce him to confess falsely. Such spiritual convictions, or spiritual exhortations, seem, from the nature of religion, the most likely of all motives to produce truth. They are, therefore, of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth—because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.

A writer of character on the criminal law of Scotland observes, in reference to this subject, (2 Alison on the Crim. Law of Scotland, 586,) "If confessions are made to a gaoler or magistrate in consequence of the exhortations of a clergy-

man, these are rightly received as evidence, because law cannot inquire into the conscientious motives which may influence a guilty man to unburden his conscience." The object of the rule relating to the exclusion of confessions, is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. Per Littledale, J., 7 Carrington & Payne, 487.

Upon principle, therefore, it would seem that the opinion of the learned judge in *Radford's case* is not law; but there is very high authority upon this question. *Rex v. Gilham* is the leading case, 1 Moody, C. C. 187, (1828). It is not accurately abstracted in any of the text-books, and is therefore given here at some length. The prisoner was tried and convicted for murder. He had been examined as a witness at the inquest on Monday, and was examined before the mayor at several times. The day after he was apprehended, which was on Wednesday morning, several articles belonging to the person in whose house the prisoner and deceased had lived as servants, were found in a room hired by the prisoner; and being opened in the town-hall, in presence of the prisoner, he went to the gaoler and said: "Well, they will hang me for this, I know; but I thank God I am innocent of the murder." The gaoler said to him: "Don't add lies to crime." On the following morning the gaoler said to the prisoner, who appeared very much distressed, that he should not be doing his duty if he did not tell him that it was his firm opinion that he was the man who did the deed. The prisoner clasped his hands together; the gaoler said "It is done now, and cannot be helped." The prisoner said, "No, it cannot."

The gaoler, after pointing out to the prisoner several passages in the Church of England prayer-book, particularly the opening sentences of the service, told him if he wished to have a spiritual adviser he would endeavor to get him one. After some conversation, the prisoner expressed a wish to see the chaplain of the gaol.

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The chaplain asked him why he sent to him? The prisoner answered, to read and pray with him. The chaplain then explained to him the nature of true repentance, and that it was not a mere acknowledgment of sin, but a deep search into ourselves, and when we found ourselves defaulters, to confess the same before God. He told him also that before God it would be better for him to confess his sins. On his examination as a witness in the case, he said that he mentioned "before God" every time he used the word "confessing." He also told him that, next to confessing before God, a most important part of the duty of repentance was to repair, by all means in his power, the injuries he had done to his fellow-creatures, and any injury done to the laws of his country. These matters were urged upon religious considerations, and on assurance that such confessions would be of spiritual benefit, and would tend to the acceptance of the prisoner with God. As he read part of the communion service to the prisoner, who seemed extremely agitated, he thought that the prisoner was on the point of making some immediate communication to him, and asked him if he would send for the gaoler, meaning it with a view of the prisoner making a communication to the gaoler, because he considered he had made a great impression on the prisoner. He told the prisoner that while any thing was pressing on his mind no services of his would afford him real comfort; that he did not wish him to confess to him, but to bear in mind the subject on which he had talked and read.

In the second interview on the same day, the prisoner alluded to the murder, when the chaplain entreated him, if he knew himself guilty, to avail himself, by the means of general repentance and faith in Christ, to be reconciled with God. At one time, during this interview, he told him that his fear, which he had expressed to the prisoner in the morning, respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind he could not afford him consolation by prayer.

The first interview lasted about two

hours; the second about an hour and a quarter. Both interviews were upon a Friday. The gaoler then saw the prisoner, and told him what had passed between himself and the prisoner's wife, and that he was perfectly satisfied what he (the gaoler) said in the morning was correct. The prisoner then said he would tell the gaoler all about it. The gaoler said, "Don't tell me any thing, but what you would wish the mayor and magistrates to know, for whatever you tell me I must inform them of."

The prisoner made a confession, and said he wished it to be communicated to the magistrates; and said he had endeavored to make up his mind to confess before, and had a great mind on Monday. He requested that the mayor should come, and hear what he had to say.

The mayor came next morning, and said to him, "Before you say any thing I think it necessary to apprise you, as I have done several times during your examination, that it will probably be given in evidence against you. You are, therefore, to exercise your own discretion, and say little, or nothing, as you may think best; and if you have changed your mind since you sent to me, and do not choose to say any thing, I will retire." The prisoner confessed, and subsequently made confessions to other officers.

The learned judge, Littledale, J., received the confessions, but as he thought the point as to these confessions was new, he reserved it for the opinion of the twelve judges.

The case came before the judges in Easter Term, 1828, and was very ably argued on both sides, by Mr. Moody for the prisoner, and by Sir William Webb Follett, (then Mr. Follett,) for the prosecution. All the judges were present, except Hullock, B. They were unanimously of opinion that the confessions were properly received. The prisoner was afterwards executed.

It was contended, on the part of the prosecution, at the trial, that even supposing that the confession made to the gaoler, immediately after the chaplain's interview with the prisoner, was not receivable in

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evidence, still that the confession made to the mayor was receivable, inasmuch as the mayor expressly cautioned him.

The learned judge, however, was not influenced by this circumstance in receiving the confessions. Indeed it could not have been a ground for receiving all the confessions.

He said that after what the chaplain had said to the prisoner, nothing which the mayor said could do away with the effect that had been produced in the prisoner's mind, and that it differed from those cases where, (a confession having been made under circumstances which prevented its being received in evidence,) if a magistrate has cautioned a prisoner not to say any thing against himself, a subsequent confession, made before a magistrate, has been admitted in evidence.

Besides, the learned judge reserved the question, "because the point as to these confessions was new," a remark which would not have applied if the circumstance of the caution by the magistrate had formed any part of the question reserved.

In the argument before the judges also, the counsel for the prosecution alluded so slightly to that circumstance, that the counsel for the prisoner, in reply, did not address his arguments at all to it.

The learned counsel who argued on behalf of the prisoner before the judges is also the reporter of the case, and the marginal note, in which he embodies what he considered the substance and the grounds of the decision, is this: "A confession, made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible."

This case, therefore, seems an express decision of very high authority, that a confession, made in consequence of spiritual exhortation or persuasion to confess, unaccompanied by any promise, and not held out with any view of temporal benefit, is admissible in evidence against a prisoner.

In *Commonwealth v. Drake*, 16 Massachusetts, 161, (1818,) the defendant was indicted for an act of open and gross lewd-

ness. His confessions, voluntarily made to members of the same church, as penitential confessions, were held to be admissible in evidence.

An earlier case, which also came before the twelve judges, illustrates the same principle. In *Sarah Nute's case*, Chetwynd's Suppl. to Burn, 101, decided in 1800, and cited as MS. C. C. R., the prisoner's mistress, whose out-house had been set on fire, pressed her to confess, and told her, amongst other things, that God would forgive her. She confessed. The next day another person told her, her mistress said she had confessed, and drew from her a second confession.

The judge (Lord Eldon) and the jury were of opinion, that the first confession was made under a hope of temporal favor, and that the second was made under the influence of having made the first. On a case reserved, the judges held that those points were not for the jury, but that if the learned judge agreed with the jury, the confessions were receivable; but many of them thought the expressions were not calculated to raise hope of favor here, and if not, the confessions were not evidence.

In *Gibney's case*, Jebb, C. C. 15, before the twelve judges of Ireland in 1822, it was held unanimously that although a confession should not be received in evidence if any threats or intimidation has been held out, the fear must be of a temporal nature; that in this case there was no such threat or intimidation, nor any fear of a temporal nature produced; any terror that might have been excited was as to what might happen in the next world. The expressions used by the constables were: "You must be a very unhappy boy to have murdered your own child, if it be the case?" "Were you not a terrible man to do such a thing?" These expressions were used before the prisoner confessed. There was a great cry of the people about him at the time. One person was anxious the prisoner should touch the body, it being a popular opinion that if the murderer touches the body of the deceased it will bleed.¹

¹ Upon this subject it is remarked by a writer on Scotch Criminal Law already quoted,

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SECTION VII. A confession is admissible in evidence made to one in authority, although the prisoner was, immediately before such confession, in the custody of another person, not produced; and although it is not shown that such person did not hold out a threat or inducement.

The rule has been stated thus: "For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the promise was made." *Phillipps, Ev. 430.*

In *Clewes's case*, 4 *Carrington & Payne*, 223, it appeared that the prisoner had an interview with a magistrate, and subsequently with the coroner. The coroner's clerk was produced, who proved that the prisoner was duly cautioned by the coroner. It was objected by counsel that the magistrate might, at the previous interview, have told the prisoner it was better for him to confess, and that therefore the magistrate ought to be called on the part of the prosecution. *Littledale, J.*, said, it would be fair in the prosecutors to call him; but that he would not compel them to do so. He was called by the prisoner, and the confession was then admitted.

In *Gibney's case*, before the twelve judges of Ireland, *Jebb, C. C. 15*, the constable, to whom the confession was made, stated at the trial, that before the prisoner confessed, the son of the prisoner's master had taken the prisoner aside and held some conversation with him. This person was not produced. It also appeared that the prisoner had been with a magistrate before the witness received him under a committal. That witness had found him in custody with that magistrate. The magistrate was not produced.

If, however, there be any probable ground to suspect collusion in obtaining the confession, such a suspicion, it is said, ought, in the first instance, to be removed. *Phillipps, Ev. 430.*

Thus in *Swatkins's case*, 4 *Carrington & Payne*, 550, a constable was called to state a confession made to him by the prisoner. He said that he went into a room in a public-house, where he found the prisoner in the custody of another constable, and that as soon as he (the witness) went into the room, the other constable left it. It did not appear why he went into the room, or why the other constable went out; but immediately after the latter went out the prisoner made the confession. *Patteson, J.*, said, that under these circumstances, and it appearing that the prisoner, after one constable left the room, at once began to make the statement to the other; and as the witness did not caution the prisoner, that it would be unsafe to receive such evidence, and would lead to collusion between constables. Another witness was called, and stated that the prisoner was not in custody under a charge against him; but that he and the other servants of the prosecutor having gone to be examined as witnesses, the prisoner attempted to run away, when the constable caught him and detained him as an unwilling witness; and it appearing that the party was not then under any charge, the learned judge received the statement in evidence without requiring the prosecutor to call the other constable.

In a case on one of the Irish circuits this question appears to have been raised, but was not decided. A constable stated he arrested the prisoner, and told him that any statement or admission would

that in an old case, a minister of religion was examined as to a confession made in his presence, and that of two bailies of the borough, and that there is nothing exceptionable in the admission of such testimony, if he heard the confession *tanquam quilibet*; that is, if he heard it as an ordinary acquaintance or bystander, and not in the confidence and under the seal of religious duty. But our law utterly disowns any attempt to make a clergyman, of any religious persuasion whatever, divulge any confessions made to him in the course of religious visits, or for the sake of spiritual consolation, as subversive of the great object of punishment, the reformation and improvement of the offender. *Alison, Practice of the Crim. Law of Scotland, 586.*

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probably be made use of against him. He then left him in the custody of another constable, who alone remained with the prisoner during the night. On the following morning the prisoner made a statement to the witness. The other constable was not produced; and counsel for the prisoner objected on that ground to the statement being given in evidence.

Ball, J., said, he would not go the length of saying that the statement would not be evidence, but that, in his opinion, such evidence was not, under the circumstances, free from objection; and he recommended it to the crown counsel to endeavor to establish the case by other means. *The Queen v. Courtney*, 2 Crawford & Dix, C. C. (Munster Circuit, 1840,) 63.

SECTION VIII. A statement, not compulsory, made by a party, not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath.

There are conflicting opinions of judges *ad nisi prius* on this point, but the proposition appears to be established by high authority.

The principle seems to be, that the party, in his capacity as a witness, might refuse to answer any question that has a tendency to expose him to a criminal charge; any statement therefore which he makes in such character is a free and voluntary statement, and is receivable in evidence. But where his answers are compulsory, and under the peril of punishment for contempt, they are not received. *Regina v. Garbett*, 1 Denison, C. C. 236; 2 Carrington & Kirwan, 474; 2 Cox, C. C. 448, (1847.)

In *Wheeler's case*, on an indictment for forging a bill of exchange, depositions of the prisoner had been taken upon oath, before commissioners of bankruptcy, after the prisoner had been charged before the mayor with forging the same bill. The question was, whether these depositions, being upon oath, were admissible against him. The case was tried by Coleridge, J., who admitted the depositions, but reserved the question for the judges. It was

argued before the judges, when all present, except Abinger, C. B., and Littledale, J., held that the evidence was admissible. 2 Moody, C. C. 45; it is also mentioned, 2 Lewin, C. C. 157; and in a note to *Owen's case*, 9 Carrington & Payne, 240. See *Stockfleth v. De Tastet*, 4 Campbell, 10.

So, the answer of the defendant in a suit in equity, instituted against him by the prosecutor, is admissible on an indictment against him. *Regina v. Goldshede*, 1 Carrington & Kirwan, 657. And where the defendant was examined before the grand jury as a witness, on a complaint against another person, and was afterwards himself indicted for that same offence, it was held that his testimony before the grand jury was admissible in evidence against him. *The State v. Broughton*, 7 Iredell, 96.

A difference of opinion existed on this point, as may be gathered from the following cases:—

In *The Queen v. Owen, Ellis, and Thomas*, on an indictment for rape and murder, coram Williams, J., 9 Carrington & Payne, 83, (1839,) the prisoners had each made and signed statements on oath, as witnesses at the inquest, and whilst they were in custody as witnesses. These statements were offered in evidence on the part of the prosecution. *Wheeler's case* was not cited, but *Wheeler's case*, 8 Carrington & Payne, 250, was referred to on the part of the prisoner, where Alderson, B., was said to have rejected evidence taken at the inquest, under similar circumstances. Williams, J., received the evidence, stating he was aware that Alderson, B., had rejected it, but that there was since a reaction of opinion on the point. He offered, however, to reserve the question, if it should become necessary. It may be observed that Alderson, B., who tried *Wheeler's case*, appears to have been in the next Court at this time, and Williams, J., had consulted with him in an earlier part of the case. The case went no further, as the prisoners were acquitted.

In *Merceron's case*, 2 Starkie, N. P. C. 366; 2 Starkie on Ev. 39, note, where a magistrate was indicted for a misdemea-

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nor, for misconduct in his office, a statement made by him, upon an examination before a committee of the house of commons, was held admissible against him. It was objected that the statement was compulsory, and that he would have been subject to a contempt if he had declined to answer. It ought to be observed, though it is not noticed by Mr. Starkie in his work on Evidence, where this case is cited, that when it was mentioned before the judges, in *Gilham's case*, 1 Moody, C. C. 203, as having been decided by Abbott, C. J., that learned judge observed, that he thought there must be some mistake, and that the evidence must have been given without oath, and before a committee of inquiry, where the witness would not be bound to answer.

In *Tubby's case*, 5 Carrington & Payne, 530, it was proposed to read an affidavit made by the prisoner at a time when he was not under any suspicion. It was objected to on the ground that a prisoner should not be sworn. Vaughan, J., said he had no doubt that it was evidence, as no suspicion attached to the party at the time. "The question is, is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time that he made it." The counsel for the prosecution having read the paper, found it contained nothing material, and withdrew it; there was, therefore, no decision in the case.

In *Wheater's case*, already mentioned, *Tubby's case* was referred to, when Vaughan, B., who tried it, observed: "What reason is there for saying that there was any restraint in that case on the person making the statement?" and counsel, in arguing *Wheater's case*, in the presence of the same learned judge, said that the ground on which the evidence was admitted in *Tubby's case* was, that at the time of making the statement the prisoner was not under suspicion.

Britton's case, 1 Moody & Robinson, 297, coram Patteson, J., (1833), has been cited by text writers as if it were a decision that conflicted with the proposition above. In Roscoe's work on the law of Evidence in criminal cases, it

is said that "Patteson, J., and Alderson, B., are reported to have held that the balance-sheet of a bankrupt, given on oath, under his commission, is not admissible against him on a criminal charge for concealing his effects;" and *Britton's case*, 1 Moody & Robinson, 297, is referred to in support of this proposition. So Mr. Phillpotts, referring to the same case, says, "it has been held that the examination of a bankrupt, taken upon oath, before commissioners, is not receivable in evidence." Phillpotts on Ev. (8th ed.) 424. And in the first edition of Greenleaf on Ev. vol. 1, p. 226, this case was also cited as a decision. But in the later editions the text has been altered. On referring to that case it will appear that there was no decision to that effect. The bankrupt was indicted for not disclosing his effects under the commission—for not delivering them over and for concealing them. It was endeavored, but ineffectually, to prove the petitioning creditor's debt; and it was then proposed to offer, in evidence, the traverser's balance-sheet, on the file of proceedings signed by him. It was offered as an admission, by the traverser, of the existence of the debt therein stated. It was objected, that the proceedings under the commission, of which the signing and filing of this balance-sheet was part, could not, in any way, be given in evidence to affect the traverser, until the validity of the commission was established.

A further objection was made by counsel, that the balance-sheet, having been given in upon oath, and the defendant's examination being compulsory, could not be brought forward to affect him criminally, as it was obtained from him under a sort of duress. *The King v. Mercer*, 2 Starkie, N. P. C. 366, was cited on the part of the prosecution, in answer to this argument. Patteson, J., consulted with Alderson, J., and said, he was clearly of opinion that the balance-sheet could not be evidence against the traverser, to prove the petitioning creditor's debt.

Thus, as above reported, the learned judges do not appear even to have expressed an opinion, much less to have "held" that a balance-sheet given in by

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the bankrupt, is not admissible against him, on the ground that it is given in upon oath; and, accordingly, in a recent case, (*Wheater's case*, before the judges, 2 Moody, C. C. 45,) when *Britton's case* was cited before the learned judge who tried it, he took the opportunity of saying that the ground of that decision was, that the balance-sheet could not be given in evidence unless there was a valid commission; and, therefore, the balance-sheet being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt, as a part of the commission.

In *Owen's case*, on an indictment for murder, 9 Carrington & Payne, 239, (1840),¹ it was proposed, on the part of the prosecution, to give in evidence the depositions of the prisoners taken on oath, at the coroner's inquest, held on the body of the deceased, and whilst the prisoners were in custody as witnesses. It was stated to Gurney, B., who tried the case, that they had been admitted on the previous trial of these prisoners by Williams, J., 9 Carrington & Payne, 83. The learned judge is reported to have said, that if the evidence were necessary, and if it is doubtful whether it be receivable in a criminal case, he would receive it, because that is the only way to have the point considered by the judges, but that he was not aware of any instance in which an examination upon oath, before a coroner or a magistrate, had been admitted against the person making it; and that depositions before magistrates, made by prisoners on oath, had been uniformly rejected. After referring to a case before Coleridge, J., where depositions before a commissioner of bankrupt were read in evidence against the prisoner, (*Wheater's case*, 2 Lewin, C. C. 157, ante, confirmed after argument by the judges,) he added, "I confess that I do not, on principle, see the distinction between that and some of the other cases. Still I am of opinion that, in the present case, I ought to reject the evidence."

In *Lewis's case*, 6 Carrington & Payne, 161, similar evidence was rejected, under the following circumstances: It appeared that on the day on which the prisoner was committed, she and several others were examined on oath, there being at first no specific charge against any person, but, on the conclusion of the examination, the prisoner was committed for trial. It was proposed, on the part of the prosecution, to read the examination. Gurney, B., refused to let it be put in, being made by the prisoner at the same time as the depositions, on which she was eventually committed, such examination not being, in his opinion, perfectly voluntary.

So in *Davis's case*, 6 Carrington & Payne, 177, where the prisoners, father and daughter, were indicted for receiving stolen goods, it appeared that the daughter had been a witness before the magistrate, and it was proposed to ask what she said there, in the presence of her father—the same learned judge refused to admit in evidence any thing she said before the magistrate, where she was a witness; as, after having been a witness, she was made a prisoner.

These three cases were all, except the first, previous to *Wheater's case*; and from the manner in which the learned Baron alludes to that case, as being decided by Coleridge, J., it would seem that he did not advert, at the time, to the circumstance that it was afterwards confirmed, upon argument, by the judges. The case of *The King v. Mercer*, ante, does not appear to have been cited in any of the three cases; and although in one of the cases *Wheley's case* was cited, where Alderson, B., had refused to receive in evidence the prisoner's depositions made at the inquest and whilst he was in custody, the court was not informed that Alderson, B., had changed his opinion upon that point, as stated in *Owen's case*, 9 Carrington & Payne, 86, ante.

It may be observed, with respect to these three cases, that at the time when

¹ The prisoners had been tried and acquitted at the previous assizes before Williams, J., as already cited, for committing a rape upon the same person.

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the depositions were taken, the prisoners were not under charge, as prisoners, of any crime. They were brought forward, though in custody, only as witnesses. As such, they might have refused to answer any question, having a tendency to expose them to a criminal charge. The principle of these decisions has therefore been questioned. See Philipps on Ev. 425. They appear irreconcilable with the decision of the judges already mentioned, and with the opinions of other learned judges in the cases before cited.

SECTION IX. Where a confession has been obtained, or inducement been held out under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence, unless, from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled.

And in the absence of any such circumstances, the influence of the motives proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will be rejected.

The first of these propositions was adopted almost in these terms, in a well considered case, in New Jersey, in 1828, *The State v. Guild*, 5 Halsted, 163, 179, 181. The second is supported by *The State v. Roberts*, 1 Devereux, 259; *Peter v. The State*, 4 Smedes & Marshall, 31. And see *Commonwealth v. Taylor*, 5 Cushing, 605.

The rule is laid down in a well-known work on evidence thus: "Where a confession has once been induced by such means, (that is, by any threat or promise,) all subsequent admissions of the same or the like facts must be rejected, for they may have resulted from the same influence." Starkie on Ev. (ed. 1824,) p. 49. The cases, however, do not support this proposition, and it has been thus qualified: "Where a confession has once been induced by such means, all subsequent admission of the same, or of the like facts,

must be rejected, if they have resulted from the same influence." Starkie on Ev. (ed. 1842,) p. 36. See also the edition of 1833. The true principle is, was the confession so connected with the inducement as to be a consequence of it. *The State v. Potter*, 18 Connecticut, 166, 180. And see *Moore v. The Commonwealth*, 2 Leigh, 701.

In *Sherrington's case*, 2 Lewin, C. C. 123, (1838,) the overseer of a colliery, at which the prisoner worked, said to him, "there is no doubt thou wilt be found guilty; it will be better for you if you will confess." A constable then came in, and said, to the overseer, in a tone loud enough for the prisoner to hear, "Do not make him any promises." The prisoner then confessed. The overseer, about ten minutes afterwards, delivered the prisoner to the constable of the township. The constable said, when he took the prisoner to his house, "I believe Sherrington has murdered a man in a brutal manner." The wife and brother of the prisoner were present, and said, "What made thee go near the cabin?" The prisoner again confessed. The constable used neither threat nor promise, but did not caution the prisoner. It was about five minutes after he received the prisoner into his charge that he made the statement. He was not aware that the overseer had held out an inducement. The overseer was not present when the statement was made. Paterson, J., refused to receive the confession in evidence. As to the first confession, he held that the constable ought to have done something to remove the impression from the prisoner's mind; and that as to the second, there ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession could be received.

The prisoner must be considered to have made the second confession under the same influence as he made the first, the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination.

So where the person to whom the confession is made is a person in inferior authority. Thus in the case of *The King*

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v. *Cooper and Wicks*, 5 Carrington & Payne, 535, the committing magistrate told the prisoner, Cooper, whose confession it was proposed to give in evidence, that "if he would make a disclosure he would do all that he could for him." After he was committed, he made a statement to the turnkey of the gaol, who held out no inducement to him, but did not give him any caution not to confess. Parke, J., would not receive the statement after what the committing magistrate said to the prisoner, more especially as the turnkey did not give him any caution.

In *Bell's case*, cited from a MS. case—MacNally on Ev. 43—coram Lord Kilwardin, C. J., and Carleton, C. J., C. P. Mullingar Spring Assizes, 1800, a confession had been obtained from the prisoner after his apprehension by his master, and also a magistrate, by menaces and promises. When the prisoner was in gaol, the witness, who was also a magistrate, went to him, and the prisoner in his presence signed a written confession. It does not appear that he was cautioned, nor what length of time had elapsed after the former confession. The witness stated that he believed the written confession, taken by him from the prisoner, was given in consequence of the impressions previously made on his mind by his master. The evidence was rejected.

In *Richard's case*, 5 Carrington & Payne, 818, on an indictment for administering poison to the prosecutrix, prisoner's mistress, the latter said to the prisoner, a girl of about fifteen years of age, that if she did not tell all about it that night, the constable would be sent for next morning to take her to Stourbridge, meaning before the magistrates. The prisoner then made a statement. Next morning the constable was sent for, and as he was taking the prisoner to the magistrates at Stourbridge, the prisoner, without any inducement having been held out by the constable, made a statement to him. The prisoner's counsel objected to this being received in evidence, as the inducement held out by the prosecutrix must be taken to have continued. Bosanquet, J., received it, and held that, as the inducement was, that

if she confessed she would not be taken before the magistrates; and as the prisoner must have known, when she made this statement, that the constable was taking her to the magistrates, the inducement was at an end.

This is a strong case. It would seem not improbable that the girl was induced to make the statement from the hope that she would thus escape from being taken before the magistrates, her mistress having told her the preceding evening that if she did not then tell all about it she would be sent to the magistrates by a constable, who was accordingly sent for on the next morning.

Where a caution is given by a person in equal or superior authority, the influence is generally considered to have ceased. Thus, in *Lingate's case*, Phillips on Ev. 431, (1815,) where the prisoner, on being taken into custody, was told by one who came to assist the constable, that it would be better for him to confess, but the committing magistrate cautioned him frequently on the following day to say nothing against himself. Bayley, J., held that the confession was clearly admissible.

So in *Rosier's case*, Phillips on Ev. 431, MS. (1821,) which came before the twelve judges, a constable told the prisoner he might do himself good by confessing; but the magistrate being asked by the prisoner, said he could not say it would be any benefit. Whereupon the prisoner declined confessing, but confessed afterwards to another constable on his way to prison, and again in prison to another magistrate. The judges were unanimously of opinion, that the confessions were admissible, on the ground that the magistrate's answer was sufficient to efface any previous expectation.

So where the prosecutor suggested to the prisoner, that he had better speak out, but the magistrate immediately checked him and desired the prisoners not to regard him, but to say what was proper. *Edwards's case*, cited Phillips on Ev. (8th ed.) 431.

So where an inducement was held out by a magistrate, who was also a clergyman, but the prisoner was cautioned by

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the coroner, and a letter from the Secretary of State refusing mercy was communicated to the prisoner by the magistrate. The prisoner was acquitted. *Clewes's case*, 4 Carrington & Payne, 225, coram Littledale, J.

In the case of *Martin Bryan*, Jebb, C. C. 157, it appeared that the prisoner said to a magistrate, when in custody, that he wished to see his priest. The priest on his examination admitted, that observing that the prisoner appeared greatly agitated he said to him, "the evidence at the inquest was so clear against you, there can be no doubt you are the guilty man." The prisoner then stated something to the witness, who thereupon asked the prisoner whether he had any objection to state to the magistrate what he had stated to him? The prisoner said he had not, and the magistrate being called in, the prisoner repeated in his presence what he had stated to the priest.

It was objected, that this could not be received in evidence under the foregoing circumstances,¹ whereupon the counsel for the crown called the magistrate again, who stated, that on the evening of the day on which he had the aforesaid interview with the prisoner, he again saw the prisoner, and cautioned him not to say any thing to him or the police to criminate himself. The magistrate was then allowed to state what the prisoner said to him on this occasion, which appeared to be in every respect the same as what he had stated in the previous interview. The prisoner was convicted. The execution of the sentence was respited, and the opinion of the eleven judges (Joy, C. B., being absent,) unanimously held, that the conviction was right.

In *Howes's case*, 6 Carrington & Payne, 404, the prisoner confessed to two constables who apprehended him, and told him that "two others had split, and he might as well; and that, if he told all, he would be acquitted." The magistrate, hearing the prisoner state, in presence of the con-

stables, that they had held out this inducement, which the constables did not deny, told the prisoner that he need not say any thing unless he pleased; that his confession would do him no good, that he would be committed to prison to take his trial. The prisoner's counsel objected to the confession, made to the magistrate, being received, as he did not seem to have gone to the full extent of telling the prisoner that his former confession would have no effect, and that the law would presume, that the confession before the magistrate was a continuation of the former confession, extorted by the constables; that the statement of the constables acting upon his mind, he would naturally imagine, that it was then too late to retract. 2 Russell, 648, and *Sarah Nute's case* were referred to. Denman, C. J., received the evidence, it not appearing to him that this statement did result from the same influence as the first, or that the cases cited carried the principle any further. The prisoner was acquitted.

It is said in Phillipps on Evidence, 430, referring to *Howes's case*, that "it does not appear to have been decided in England whether generally a caution by a person will make a confession to him admissible, notwithstanding a previous inducement by himself."

This question seems to have been raised and decided in an American case, the circumstances of which were these: a magistrate told the prisoner's wife "that if what she said to him was true, her husband had better confess. He held out no inducement to fear or favor, other than was implied in these words. The prisoner was then in custody, but not in the room in which the magistrate used these words. The wife then asked the witness, Can we put confidence in him? Witness said, 'You may confide in the magistrate.' On the next morning the same magistrate took the examination of the prisoner, and told him that nothing he had said before should induce him to expect any favor;

Quære?—See *Gilham's case*, ante. It does not appear that the priest held out any inducement.

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but that he (the magistrate) had all the facts, and it would be better to tell them truly, for if he did not he would detect him in a falsehood. He then examined him in the usual manner. The court held, that the confession was, under these circumstances, inadmissible — that this was holding out an expectation of favor, inconsistent with the free and voluntary spirit in which a confession should be made — that the mind of the prisoner was unduly influenced by what was said to him; and that it did not alter the case, that the examination was not taken until the next morning — that the influence continued to exist throughout the night, and could not be fairly supposed to be removed by what was said to him at that time. This was given as the judgment of the court, which, from the language used in the report, seems to have consisted of more judges than one. It may be questioned whether this case could be followed in England consistently with the principle of the cases already cited. *The People v. Robertson and Ferris*, 1 Wheeler's Reports of Criminal Law Cases, (New York, 1823,) 67.

It is stated in Mr. Phillipps's work on Evidence, (p. 430,) that "where an inducement has been held out by a prosecutor, or by a person in authority, it would seem, in general, that a subsequent confession to such persons would not be receivable." The learned writer cites in support of this proposition, *Nute's case* and *Sexton's case*, and 2 East, P. C. 658; but in *Nute's case*, as reported in Russell, the confession tendered in evidence was made to another, and not to the same person who held out the inducement, and to whom the first confession had been made. The jury rejected it, being of opinion that it was under the influence of having made the first confession. The passage cited from East, states generally, that "where a prisoner has been once induced to confess, upon a promise or threat, it is the common practice to reject any subsequent confession of the same, or like facts, though at a subsequent time." No distinction appears to be made here between a confession to the same person, who

holds out the inducement and a confession to another person. So in *Sexton's case*, the confession, which Best, J., refused to receive, was not made to the officer who held out the inducement, but subsequently to a magistrate, a third person, in the presence of the officer. Best, J., said in that case, that if the magistrate had told the prisoner that what he had already said to the officer, could not be given in evidence against him, that his statement to the magistrate, who had duly cautioned him, would be admissible. As to the authority of *Sexton's case*, see ante, Section II.

SECTION X. A confession may be inferred from the conduct and demeanor of a prisoner, when a statement is made in his presence, affecting himself, unless such statement is made in the deposition of a witness, or examination of another prisoner, before a magistrate.

The cases upon this point proceed upon the maxim, *Qui tacet consentire videtur*.

In *Bartlett's case*, 7 Carrington & Payne, 332, the prisoner's wife in his presence, and whilst he was in custody on a charge of murder, said to prisoner, "Oh Bartlett! how could you do it?" he looked at her and said, "Ah! what? you accuse me of the murder too!" She said, "I do, you are the man that shot my mother." The prisoner made no reply. She then turned to the witness and said, "this is done for money." The prisoner's counsel objected that as the wife could not be examined on oath against the prisoner, what she said could not be used in evidence against him. Bolland, B., said he had no doubt the evidence was admissible. The prisoner was convicted.

In *Smithies's case*, 5 Carrington & Payne, 332, on an indictment for arson, the prisoner's wife made some observations to the prisoner, on the subject of the fire, to which he made an evasive reply. The prisoner's counsel objected to these observations being admitted, as he was instructed, that the wife was now in court, and if she could be by law examined, would directly contradict the proposed statements. Gasalee, J., and Park, J., were

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both of opinion, that the statement was admissible; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as evidence of an implied admission on his part. The prisoner was found guilty.

In Massachusetts, this principle has recently been discussed in the case of *Commonwealth v. Kenney*, 12 Metcalf, 235, (1847.) In this case a witness testified that he was in one of the watch-houses in Boston, between eleven and twelve o'clock in the evening of September 5th, 1846, and that while he was there two of the watchmen of the city, having the defendant in custody, came in; that one of the watchmen said, "here is a man that has been robbing a man;" that presently Russell, the person named in the indictment as having been robbed, came in crying, and said, "that man" pointing to the defendant, "has stolen my money;" that the other watchman, named Baxter, made a search of the defendant's person, but found nothing, and was proceeding to lock him up in the cellar; that as the defendant was going down cellar, the witness saw him put his hands up, turn himself, and shove something between a water-bucket and a little earthen pot, that stood on a shelf built up in the corner of the watch-house; that the witness then got up from his seat, looked at the place where the defendant had put his hands, and saw a bag, which he took up, and thereupon said, "here is the bag;" the defendant then being on the stairs, going down cellar, and within hearing; that Russell immediately said, "that is my bag;" that Baxter then took the bag, and counted the money in it; and that while Baxter was counting the money—the defendant then standing in the watch-house—Russell said, "that was all the money I had in the world;" and that the defendant made no reply to any of the aforesaid declarations.

Shaw, C. J., in delivering the opinion

of the court, said: "But on another ground, we take a different view of the admissibility of the evidence, depending on the question whether the statements of Russell in the hearing of the defendant, and the silence of the latter, do amount to a tacit admission of the facts stated. It depends on this: If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply, because it is the act of the party, who will not be presumed to admit any thing affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the declaration, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in the present case he has reported the facts, on which the competency of the evidence depended, and submitted it, as a question of law, to this

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court. The circumstances were such, that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watch-house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant, (of which we think there was evidence,) was made whilst he was under arrest, and in the custody of persons having official authority. They were made, by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say any thing until regularly called upon to answer. We are therefore of opinion that the verdict must be set aside and a new trial granted."

In *Commonwealth v. Call*, 21 Pickering, 515, 521, it was held, that confessions of an accomplice made in the presence of the defendant, and assented to by him, are admissible in evidence against him. Morton, J., said: "Although the confessions of an accomplice, as such, are not competent evidence; 1 Phillips on Ev. 87; Kelyng, 18; Gilbert on Ev. 124, yet when made in the presence of the defendant, and assented to by him, there can be no doubt of their admissibility. Indeed, had his express assent been wanting, they would have been admissible. Where declarations against a party are made in the presence and not objected to by him, he being at liberty to do so, his assent is implied, and they are always deemed competent evidence."

The qualification of the above propo-

sition, or exception to it, includes those cases, where the deposition of a witness or examination of another prisoner before a magistrate, in presence of the prisoner, contains some statement affecting the prisoner. Such statement seems, according to the best authorities, not to be admissible in evidence, even as an implied admission. Thus in *Turner's case*, which came before the judges on another point, 1 Moody, C. C. 347, it was proposed to prove a confession of a female prisoner, made before a magistrate in the presence of another prisoner, in which various facts were stated, implicating the other as well as herself. Patteson, J., refused to receive this in evidence.¹

In *Melen v. Andrews*, Moody & Malkin, 336, in an action on the case, for maliciously laying an information before magistrates, under the stat. 7 & 8 Geo. 4, ch. 30, it appeared that the plaintiff had cross-examined the defendant Andrews before the magistrates, and had commented upon his evidence. The defendant's counsel then proposed to inquire of the witness, what another party examined on that occasion, but not a party to the record in this case, had stated, on the ground that it was said in the plaintiff's presence; and that he had the opportunity of cross-examining the witness, and observing upon his testimony, and had used that privilege, in reference to the defendant Andrews.

Parke, J., refused to admit the evidence; observing, that "the deposition of a witness, taken in a judicial proceeding, is not evidence, although the party, against whom it is sought to be read, was present, and had the opportunity of cross-examining; and that in an investigation of this nature, there is a regularity of proceeding adopted, which prevents the party from interposing, when, and how he pleases, as he would in a common conversation; that the same inference therefore could not be

¹ Counsel for the prisoner relied on *Appleby's case*, cited post, p. 219. The circumstance of the statement, not being on oath, does not seem to affect the principle of the decision. See Phillips on Evidence, 422 and 423, (note 1.)

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drawn from his silence, or his conduct in this case, which generally may in that of a conversation in his presence, and that it was only for the sake of these inferences that the conversation can ever be admitted."

So in *Appleby's case*, 8 Starkie, N. P. C. 33, where it was proposed to show, that when the prisoners were taken, and examined before a magistrate, one of them, being charged by the examination of another, did not deny the charge. Holroyd, J., refused to receive the evidence, and said, that it had been so ruled by several of the judges in a similar case, which had been tried at Chester.

The case of *Rex v. Edmunds*, 6 Carington & Payne, 164, before Tindal, C. J., has been considered at variance with the above authorities.¹ The prisoner was charged with murder a few days after the night on which the blow was given; the deceased made a complaint before a clergyman, and the prisoner was, in consequence, brought before two magistrates on a charge of assault; one of the magistrates stated, that on the examination of this latter charge, the deceased made a statement, and the prisoner made a statement in answer to it. Neither of these statements was reduced into writing, as the case was one of summary conviction. The prisoner was convicted by the magistrates.

Tindal, C. J., admitted in evidence what the deceased and the prisoner said upon this examination; the learned judge said: "I shall not, however, hold that what the deceased said is evidence, as proving the facts he stated, as it would be if it were a deposition taken under the statute 3 Geo. 4, ch. 64; but only evidence, as producing an answer from the prisoner, like any other conversation; and I do not think it is the less evidence, because it is upon oath. I shall therefore admit it as a conversation. The prisoner was found guilty of manslaughter. Mr. Phillipps observes, that "this case seems

of doubtful authority;" it may be remarked, that although the prisoner's counsel objected on another ground, the attention of the court does not appear to have been called to this objection, that the statement was made on an examination before a magistrate, which has been considered as preventing a prisoner from interposing at his will and pleasure, and therefore as shutting out any inference to be drawn from his silence. Phillipps on Evidence, (8th ed.) 423.

SECTION XI. Where a confession is not admissible, from the circumstances under which it was obtained, contemporaneous declarations of the party are receivable in evidence or not according to the attending circumstances, but any act of such party, though done in consequence of such confession, is admissible in evidence, if it appears from a fact thereby discovered, that so much of the confession as immediately relates to it, is true.

In *Warickshall's case*, 1 Leach, C. C. (4th ed.) 263, Old Bailey Sessions, 1783, coram Nares, J., and Eyre, B., where the confession was rejected as made under promises of favor, the fact that part of the stolen property was obtained through means of the confession was admitted. It was objected, that to receive it was to make the prisoner the deluded instrument of her own conviction, and to violate the faith which the prosecutor had pledged. The court said, it was a mistaken notion, that the evidence of confessions and facts, obtained from prisoners by promises and threats, was to be rejected from a regard to public faith; that no such rule ever prevailed, that the idea was novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law.

Confessions are received in evidence or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit,

¹ Mr. Phillipps, in his *Work on Evidence*, 1, 423, (8th ed.) says that this case seems of doubtful authority.

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because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession, forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.¹ This principle respecting confessions, has no application whatever to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession, from which they may have been derived; and the impossibility of admitting any part of the confession, as a proof of the fact, clearly shows, that the fact may be admitted on other evidence, for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not; (see *Gould's case*, post,) and the consequences to public justice would be dangerous indeed; for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed, because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other. It is true, that many able judges have conceived, that it would be an exceedingly hard case,

that a man whose life is at stake, having been lulled into a notion of security by promises of favor, and who in consequence of those promises has been induced to make a confession by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate against him. But this subject has more than once undergone the solemn consideration of the twelve judges; and a majority of them were clearly of opinion, that although confessions, improperly obtained, cannot be received in evidence, yet that any acts done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. 1 Leach, C. C. 264, (ed. 1815.)

In *Gould's case*, 9 Carrington & Payne, 364, (1840,) a statement had been made by the prisoner, under circumstances which induced the prosecution, with the approbation of the court, not to offer it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked, whether, in consequence of something which the prisoner had said, he made search for the lantern? Tindal, C. J., and Parke, B., received the words used by the prisoner, with reference to the thing found, but not the other parts of the statements received. The prisoner was found guilty.

In the case of *Rez v. Harris, Evans and Buller*, 1 Moody, C. C. 338, (1832,) on an indictment for killing a sheep, with intent to steal the carcase, where the admissibility of a confession was reserved by Littledale, J., for the opinion of the judges, the learned judge admitted in evidence the facts, that, after this statement, the prisoner went with two persons to a field, and said "he could find the skin buried;" that he showed them

¹ Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared, that Mr. Harrison was alive. 1 Leach, C. C. 264, (ed. 1815.) MS. case.

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the place; that they dug it up, and that it was the skin of the sheep which had been lost.

In *Thurtell's case*, cited by Mr. Alison, in his work on the Criminal Law of Scotland, 2, 584, although a confession obtained, by means of promises or hopes of impunity held out, was not used in evidence against him, yet, the fact that goods were recovered or a corpse found, in consequence of the confession, and at the place mentioned in the confession, was held receivable in evidence.

In *Commonwealth v. Knapp*, 9 Pickering, 496, 511, (1830,) where the prisoner's confessions were excluded, as having been improperly obtained, a witness was allowed to testify, that a weapon used in the commission of the murder, was found by him in a particular place, and that he was directed to the place by the prisoner.

The reason for excluding a confession is to guard against the possibility of an innocent person being from weakness seduced untruly to accuse himself, in hopes of thereby obtaining more favor, or from fear of meeting with more punishment; that reason is done away, if such confession be substantiated by an actual finding of the goods accordingly, in the place described, which would not probably be known to the party, if he were not privy to the felony. 2 East, P. C. 658.

In *Mosey's case*, 1 Leach, C. C. (4th ed.) 265, note, a confession was made, and goods found in consequence of it. Buller, J., (present, Eyre, B.,) said: "Whatever acts are done, are evidence; but if those acts are not sufficient to make out the

charge against the prisoner, the conversation on confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject-matter of proof. A prisoner was tried before me, where the evidence was just as it is here; I stopped all the witnesses when they came to the confession;—the prisoner was acquitted. There were two learned judges on the bench, who told me, that although what the prisoner said was not evidence, yet, that any facts arising afterwards must be received; this point, though it did not affect the prisoner at the bar, was stated to all the judges; and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done afterwards may be given in evidence, although they were done in consequence of the confession." See also *Lockhart's case*, 1 Leach, C. C. (4th ed.) 386. But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is, that the prisoner may have been thereby induced to say what is false, but the fact discovered shows, that so much of the confession as immediately relates to it is true. *Rex v. Butcher*, 1 Leach, C. C. (4th ed.) 265, note.

In *Cain's case*, 1 Crawford & Dix, C. C. 37, 1839,¹ where an admission of a female prisoner to a constable that the child (for concealing whose birth she was indicted) was in the bedstead, was rejected on the ground that the witness had interrogated the prisoner in a threatening manner, Torrens, J., admitted evidence of the acts:

¹ The constable went to the prisoner's house, and said, "Where is your child?" The prisoner replied, "I have no child." Witness then said, "I have received information that you were delivered of a child." The prisoner persisted in denial, when the witness said, "I shall search for the child, so you had better tell me where it is." The prisoner then said, the child was in the bedstead, and the witness, upon search, found it there. The confession was not admitted. It does not appear from the report that the question was argued; there was a subsequent confession by the prisoner to another person, which was admitted in evidence. It would seem, that a threat to search for the child was not calculated to induce the prisoner untruly to confess herself guilty, which is the test of its admissibility, (ante, Section 1,) while, on the other hand, the confession naturally led to her immediate apprehension.

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the search for, and the finding of the child in the bedstead, which were done in consequence of the admission.

In *Griffin's case*, Russell & Ryan, C. C. 151, (1809,) the prisoner was indicted and convicted of stealing a guinea and two promissory notes, in a dwelling-house. One of the notes was a Bank of England note for £5, the other a Reading bank-note for the same sum. The prosecutor, after detailing a conversation with the prisoner, was proceeding to state a confession, but as he admitted that he had told the prisoner it would be better for him to confess, Chambre, J., stopped him, but permitted him to prove "that the prisoner brought to him a guinea and a £5 Reading bank-note, which he gave up to the prosecutor, as the guinea and one of the notes that had been stolen from him."

The learned judge told the jury, that notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence that it was the stolen note. In Easter Term, 1809, a majority of the judges, namely, Lord Ellenborough, Mansfield, C. J., Macdonald, C. B., Keating, Grose, J., Chambre, J., and Wood, B., held the conviction right, and the evidence admissible.

Lawrence and Le Blanc, JJ., were of a contrary opinion. Le Blanc, J., was of opinion, that the production of the money by the prisoner was alone admissible, and not his saying at the time he produced one of the notes, "that it was one of the notes stolen from the prosecutor."

The remark of the court in *Jenkins's case*, post, "that the influence which might produce a groundless confession, might also produce groundless conduct," seems applicable to the circumstances of this case. The money produced, however, corresponded in amount and in general character with that taken from the prosecutor, and the statement identifying it was contemporaneous with the fact of the production of the money. It was not a confession of the prisoner's guilt, but an iden-

tification of the property which had been taken from the prosecutor.

In *Jones's case*, Russell & Ryan, C. C. 152, (1809,) which came before the twelve judges on the same day as *Griffin's case*, the prosecutor, with others, had been in pursuit of the prisoner, having found him in custody of a constable, to whom he had been delivered by a sergeant of marines, asked the prisoner for the money that he had taken out of his pack, upon which the prisoner took 11s. 6½d. out of his pocket, and said that was all that was left of it. The sergeant gave the same account, but added, that before the prisoner produced the money, the prosecutor said "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased." Chambre, J., left the whole of this evidence to the jury, who found the prisoner guilty. In Easter Term, 1809, the majority of the judges present, namely, Macdonald, C. B., Chambre, Lawrence, Le Blanc, and Heath, JJ., held the evidence inadmissible and conviction wrong. Mansfield, C. J., Wood, B., Grose, J., contra. Lord Ellenborough *dubitante*.

The case of *Rex v. Jones* was acted upon by Vaughan, B., who rejected evidence offered under precisely similar circumstances in *Clarke's case*, MS., 1828, cited by Mr. Carrington in his Supplement to the Treatises on Criminal Law.

In *Jenkins's case*, Russell & Ryan, C. C. 492, the case was tried and the prisoner convicted, before Bayley, J., and Parke, J., at the Old Bailey Sessions, Michaelmas, 1822. The prisoner was induced, by a promise from the prosecutor, to confess his guilt, and after that confession, he carried the officers to a particular house, as the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person denied knowing any thing about it, and the property was never found. The evidence of the confession was not received; the evidence of his carrying the officer to the house was. Bayley, J., stated the case for the consideration of the judges; they held the evidence inadmissible, and the conviction wrong. The

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confession was excluded, because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence, which might produce a groundless confession, might also produce groundless conduct.

In this case, there appears to have been nothing to confirm either the prisoner's statement or his conduct.

In *Harvey's case*, 2 East, P. C. 658, (Bodmin Summer Assizes, 1800,) Lord Eldon said, that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession, he should direct an acquittal, unless the fact itself proved, would have been sufficient to warrant a conviction without any confession leading to it; and the learned judge so directed the jury in that case.

SECTION XII. Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible, although such statement neither appears in the written examination, nor is vouched by the magistrate; and a confession before a magistrate is admissible, although it was made before the evidence of the witnesses against the party was concluded.

The first part of this proposition seems warranted by a case before the judges, next cited, but it has been remarked, that such parol statements are liable to considerable suspicion from the very circumstance of their not having been taken down by the magistrate, and that they ought therefore to be received with the greatest caution. Phillpotts on Ev. 447.

In the case of *Harris, Evans and Butler*, 1 Moody, C. C., 338, (1832,) cited ante, on another point, the prisoners were tried before Littledale, J., for killing a ewe, the property of Thomas Bennet, with intent to steal the carcass. There was a second count for stealing the ewe. The prisoners, in consequence of a statement made by Butler to one Robinson, were taken before a magistrate, who stated in his evi-

dence at the trial "that the examination produced was all that was taken down, that was what each of the prisoners said, it was all in the handwriting of the witness, the examinations were read over to the prisoners, and were signed by all three, and that he had taken down every thing said by them that he heard, and that the papers produced contained every thing, as he believed, that transpired before him. The room was very full." The papers produced were the depositions of the three prisoners, and the examination and confession of Butler, as to each offence, and the examinations of the other two prisoners, which latter were silent as to Bennet's sheep altogether. These examinations were signed by the two prisoners, as marksmen, respectively.

Robinson was present during the examinations, and stated, that Harris said to the magistrate, he was connected with the taking of Bennet's sheep, and that Harris said further, that "they took a neddy out of the road and put the sheep upon him, and the neddy tumbled," and that these words were addressed to the magistrate. That Evans also said, "he helped to take Bennet's sheep," and that he addressed himself, in saying so, to the magistrate.

Bennet, one of the prosecutors, said he was at the magistrate's, that he heard Harris and Evans, that Harris said, he helped to take Bennet's ewe, and that Evans, after he had been admonished by his fellow-prisoner Harris to speak the truth, said, "he helped to do it, he helped to take his (Bennet's) sheep," and that what both said was addressed to the magistrate.

It does not appear that there was any evidence against either of the prisoners, Evans or Harris, as to Bennet's sheep, the subject of the indictment, except this parol evidence of confession before the magistrate. It was objected, that as Harris and Evans had made a confession, which had been taken down in writing by the magistrate, a confession, as to Bennet's sheep, could not be supplied by parol evidence; that parol evidence could not under the circumstances be admitted of any thing else that was addressed to the magistrate.

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The prisoners were all found guilty, and the opinion of the judges was requested, whether the parol evidence of Robinson and Bennet as to what passed before the magistrate was admissible. All the judges (except Lord Lyndhurst, C. B., Bosanquet, J., Taunton, J., and Gurney, B., who were absent,) were unanimously of opinion, that the evidence, being precise and distinct, was properly received, and that the conviction was right. See 2 Russell on Crimes, (3d ed.) p. 876-878, note, by Mr. Graves; 1 Greenleaf on Ev. (7th ed.) § 227, note.

Molony's case, upon this point, was previous to *Harris's case* before the judges, the former being in 1831, the latter in 1832. Littledale, J., who tried the former on circuit, concurred with the decision of the judges in the latter. That decision was unanimous. The former case does not appear to be reported; it is thus briefly mentioned in Matthews's Digest of Criminal Law, published in 1833: "But if an observation made by the prisoner ought to have been taken down in writing, and was not, it is inadmissible. *Rex v. Mulvey*, per Littledale, J., Lancaster Spring Assizes, 1831, MS." This is copied by Roscoe, without any other reference, and it is miscalled *Molony's case*. See 1 Greenl. on Ev. (7th ed.) § 227, note.

In *Spilsbury's case*, 7 Carrington & Payne, 188, Coleridge, J., admitted parol evidence of a statement made by the prisoner before the magistrate, in the course of the examination of one of the witnesses, but not forming part of what the prisoner said when he was called on for his defence. The learned judge observed, that "as that would not be put down as a part of the statement of the prisoner, he was clearly of opinion that it was receivable; that if the prisoner, being asked at the close of the evidence for the prosecution, does say something, it is taken down, and the evidence of that statement is the written deposition, but if a prisoner says any thing while the witnesses are under examination, that does not stand on the same ground."

In *Rowland v. Ashby*, Ryan & Moody, N. P. C. 231, at Guildhall, March, 1825, coram Best, C. J., it was proposed to give in evidence an admission by the plaintiff on his examination before commissioners of bankrupt, that he was in partnership with his son. There was no such admission in the written examination produced. It was objected that the evidence was inadmissible, the case being the same as the examination of a prisoner before a magistrate; that it must be presumed the commissioners had done their duty and had made a faithful account of the plaintiff's evidence.

Best, C. J., admitted the evidence, and said that in regard to the statute for examination of prisoners by a magistrate, it had been used for a different purpose than had been intended; and that his opinion was that upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by the committing magistrate.

It seems that the object of the old statute of Philip and Mary, requiring the examination of prisoners to be taken, was to enable the judge and jury to see whether the witnesses were consistent or contradictory in the evidence they gave. Grose, J., in *Lambe's case*, 2 Leach, C. C. 552, (ed. 1815,) says, that the only object of the legislature in enabling the magistrate to take informations was to enable the judge and jury before whom the prisoner is tried, to see whether the offence is bailable, and whether the witnesses are consistent or contradictory in the evidence they give. There is not a single expression from which it is to be collected that the examination was directed to be taken merely as evidence against the prisoner; nor indeed is the examination ever given in evidence as a matter so required by the statute; but containing a detail of circumstances taken under the solemnity of a public examination for a different purpose, it is more authentic, on account of the deliberate manner in which it is taken, and when it contains a confession it is admitted, not by force of the statute,

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but by the common law, as strong evidence of that fact.¹

In 1 Greenl. on Ev. § 227, it is said, that "the law *conclusively presumes*, that if any thing was taken down in writing, the magistrate performed all his duty by taking down all that was material. In such case, no parol evidence of what the prisoner may have said on that occasion can be received." In a note, the learned author says: "Mr. Joy in his Treatise on Confessions, p. 89-92, 237, dissents from this proposition, so far as regards the *conclusive* character of the presumption, which, he thinks, is neither 'supported by the authorities,' nor 'reconcilable with the object with which examinations are taken.' But upon a careful review of the authorities, and with deference to the opinion of that learned writer, I am constrained to leave the text unaltered."

In respect of the second branch of the proposition above, that it is not necessary, in order to make a confession admissible, that the prisoner should be first put in possession of all the evidence against him; it was so held in *Bell's case*, 5 Carrington & Payne, 163, coram Gaselee, J., who

conferred with Lord Tentarden, C. J., on the case, where several depositions were taken in the prisoner's presence, both on the day on which the confession was made and on a previous day, and other depositions were taken on a day subsequent to that on which the prisoner confessed, some in his presence, others in his absence. Lord Tentarden, C. J., and Gaselee, J., agreed that the opinion of Garrow, B., in *Fagg's case*, was much too general, as it would go to exclude any acknowledgment of guilt made by a prisoner to a constable.

In this latter case, (4 Carrington & Payne, 567,) Garrow, B., admitted the evidence, but expressed a doubt as to its legality. He thought that nothing said by a prisoner, before he knew what evidence was against him, ought to be used to criminate him; and he censured the practice of taking such a statement from a prisoner, who ought only to be asked whether he wished to say any thing in answer to the charge, when he had heard all that the witnesses in support of it had to say against him.

¹ In *Lewis's case*, 6 Carrington & Payne, 162, Gurney, B., refused to receive parol evidence of something said by the prisoner, not taken down in the depositions which he made as a witness before the magistrate. The depositions had been rejected, on the ground that they were not voluntary. This would apply to the statement not taken down as well as that which was. Mr. Phillippis, 446, note 4, speaks of this as a case in which the judge refused to receive similar evidence to that which was received in *Harris's case*, ante, 223 — but the latter was the case of an examination not upon oath.

In *Walter's case*, 7 Carrington & Payne, 267, it was stated on the depositions returned by the magistrate that the prisoner declined to say any thing; Lord Abinger, C. B., was of opinion that, under these circumstances, parol evidence was not admissible of a confession of the prisoner alleged to have been made on his examination; but the point was not decided, the other evidence in the case being sufficient. The prisoner was found guilty. In this case the parol evidence proposed to be given would have directly contradicted the return made by the magistrates; but the circumstance of some part of the prisoner's statement being omitted by the magistrate, would not, it seems, render the examination inadmissible, if it has been read over to the party, and he has not dissented from its correctness. Thus, in a civil suit, *Milward, assignee of Gates v. Forbes*, 4 Espinasse, 170, the examination of the defendant before commissioners of bankrupt was tendered in evidence against him in an action of trover. It was proved that the defendant had said more on the examination than was taken down, that the commissioner had taken down only what he considered relevant — but that nothing relevant was omitted, whether it made for or against the party, and the examination was read to the defendant before he signed it. Lord Ellenborough, C. J., held, that the party having signed it, after he heard it so stated from his own words, and read over to him before he signed it, it must be taken to be a statement of facts admitted by him, and it was therefore evidence.

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SECTION XIII. Parol evidence of a confession made during an examination before a magistrate, is admissible in evidence, although it was taken down in writing by the magistrate, if from informality the written examination is not admissible; and such examination, though informal, may be used to refresh the memory of a witness who was present and took it down.●

This proposition strictly belongs to the subject of Secondary Evidence. It is, however, immediately connected with the subject in discussion.

Telicote's case, 2 Starkie, N. P. C. 483; *Foster's case*, 1 Lewin, C. C. 46; *Hirst's case*, 1 Lewin, C. C. 46; and *Pressly's case*, 6 Carrington & Payne, 183, are instances of the admissibility of such parol evidence, where the examinations are not signed by the prisoner. In *Tarrant's case*, 6 Carrington & Payne, 182, where it did not appear on the face of the examination, that it was taken on a charge of felony, or that the magistrates who signed it were then acting as such, Patteson, J., allowed the clerk to the magistrates to refresh his memory from the paper.

In *Bell's case*, 5 Carrington & Payne, 162, the confession had been taken down in writing by the magistrate's clerk; the prisoner, after it was read over to him, put his mark to it. The clerk attested it thus, "taken and signed by the said John H. Bell, in the presence of." The prisoner's counsel objected to the admissibility of this document, on the ground that there was a false attestation. Gaselee, J., after consulting Lord Tenterden, C. J., said, they were both of opinion, that the confession might be repeated by the magistrate's clerk, who heard it, and that he might refresh his memory by aid of the written paper. The prisoner was convicted.

The same course was pursued in *Jones's case*, Carrington, Suppl. 13; *Watkins's case*, 4 Carrington & Payne, 550, note b;

and *Reed's case*, 1 Moody & Malkin, 403. It does not appear what the irregularity in the examination was. See a case before Lord Lyndhurst, referred to, 5 Carrington & Payne, 164, note.

In *Pressly's case*, 6 Carrington & Payne, 183, Patteson, J., said, he thought it would be the more safe course that the examination itself should not be read. The clerk to the magistrates, by whom it was taken, was allowed to refresh his memory from it.

In *Lambe's case*, 2 Leach, C. C. (ed. 1815,) 552, which came before the twelve judges, the examination, which had been read over to the prisoner, but was not signed either by him or by the magistrate, was received *per se* as a paper writing, but not as an official document.

In *Thomas's case*, 2 Leach, C. C. (ed. 1815,) 637, minutes taken by the solicitor for the prosecution, on the examination of the prisoner before a magistrate, and at the instance of the magistrate, were admitted in evidence, though they were not signed either by the magistrate or the prisoner. The prisoner's counsel attempted to distinguish that case from *Lambe's case*, on the ground that, in the latter case, the prisoner had acknowledged before the magistrate that the contents of the examination were true, although he refused to sign it, whereas in the present case the prisoner refused to sign the examination, because part of it, he said, was not true.

The court had no doubt that these minutes might be read in evidence, and said, that in *Lambe's case* the judges were of opinion, that if such written examination were to be adjudged not admissible, this monstrous proposition would follow, that whatever a prisoner says, when not before a magistrate, would be admissible, though depending on the faculty of memory; but that the moment a prisoner gets before a magistrate, it would not be admissible, though taken down in writing, under circumstances of the greatest caution and solemnity.¹

¹ Where the prisoner's examination is produced, it is admissible in evidence, without calling either the magistrate, before whom, or the clerk, by whom it was taken down. See *Hopes's case*, 7 Carrington & Payne, 136; *Taylor's case*, Ibid. 138; *Foster's case*, Ibid. 148;

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It may be remarked here, that a parol confession is admissible in evidence, although it appears that a confession was made subsequently to a magistrate, which was taken down in writing, and which is not produced in evidence. Thus, in *Carty's case*, *Ridgway's R.* 73, at a Commission of Oyer and Terminer at Dublin, 37 Geo. 3, coram Boyd, J., and Downes, J., cited *MacNally* on Ev. 45; *Phillipps* on Ev. (8th ed.) 446, it was proposed to give in evidence a private conversation between the last, (the prosecutor,) and the prisoner after he was committed to gaol. A declaration or confession of the prisoner had been subsequently taken in writing, on an examination by a magistrate. At the time of the conversation in question, no certain information had been given, or was in contemplation by the prisoner.

The witness stated, that the evidence before the magistrate was taken about a fortnight after the prisoner was committed, and was taken in the presence of the witness, but not by him; that he believed it was still in existence; but that the conversation which he had with the prisoner, and which he proposed to detail, happened about a fortnight before the taking of such written confession. It was then urged, on behalf of the prisoner, that the witness spoke from memory only; that such evidence might err; that written evidence could not, and was, therefore, the only proper evidence of the confession. The parol evidence was admitted. The court had no doubt as to its admissibility.

It is presumed, unless the contrary is proved, that the magistrate has taken down the prisoner's examination in writing, where the statute requires him so to do; and, therefore, in order to render parol evidence admissible, it must be proved that such examination was not reduced into writing.

In *Jacobs's case*, 1 Leach, C. C. (4th ed.) 310, Gould, J., said, referring to the old statutes, justices of peace, when any pris-

oner is brought before them on a charge of felony, shall take the examination of the said prisoner, and the information of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as may be necessary to prove the felony, shall be put in writing within two days after the examination, and certified to the next general gaol delivery. The statutes do not leave this matter to the option of the magistrate, but they say that he shall do it; and, whatever may have crept into practice, the directions of this law ought not to be dispensed with. The rule of law is the compass by which the court ought to be guided. What a prisoner says in other places may undoubtedly be received upon *vivâ voce* testimony; but as the law requires that his examination before the magistrates shall be reduced into writing, and returned to the court, the particulars of such examination cannot be given in evidence *vivâ voce*, unless it be clearly proved that in fact such examination never was reduced into writing.

The same was held by Ashhurst, J., in *Hinzman's case*; and by Heath, J., in *Fisher's case*, 1 Leach, C. C. (4th ed.) 310, 311, note.

It may be remarked here, that a confession made by a prisoner is not, according to present rules, allowed to be received in evidence for the purpose of criminating any one but himself. This principle of English law was established by a resolution of the judges in *Tong's case*, Kelyng, 17, 18, early in the reign of Charles II.; and, like the rule requiring witnesses to be examined in open court, appears to have been one of the judicial reforms owing their origin to the Commonwealth. See *The Great Oyer of Poisoning*, by Andrew Amos, Esq., p. 296. So a confession of a principal felon is not admissible against an accessory. The question arose in *Turner's case*, and was reserved by Patteson, J., for the judges. All the judges met, except Lord Lyndhurst, C. B.,

Rees's case, Ibid. 568; *Reading's case*, 7 Carrington & Payne, 649; *Pikesley's case*, 9 Carrington & Payne, 124; *Hearne's case*, Carrington & Marshman, 109; *Wilshaw's case*, Ibid. 145.

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and Taunton, J., and were unanimously of opinion that the confession of the person who stole the goods was not evidence against the receiver, and that the conviction was wrong. 1 Moody, C. C. 347. The principal felon was still alive, but the decision did not turn upon this circumstance.

Where a confession affects in its terms other prisoners, and implicates them by name, the judge will tell the jury that the confession does not legally affect any one but the person who made it; but the confession must be proved as it was made, and the names of all implicated by it must be mentioned. *Foster's case*, coram Lord Denman, C. J., 1 Lewin, C. C. 110; *Hearne's case*, 4 Carrington & Payne, 215; *Cleves's case*, Ibid. 225; *Hall's case*, coram Alderson, J., 1 Lewin, C. C. 110; *Fletcher's case*, coram Littledale, J., Ibid. 107; *Walkley's case*, 6 Carrington & Payne, 175. See 1 Lewin, C. C. 110, *Barstow's case*, where Parke, J., though *Fletcher's case* was cited, held contra. It is believed, however, that juries are not much influenced by cautions regarding the legitimate bearing of evidence; for it requires a very discriminating judgment to listen to evidence for one purpose, but to pay no regard to it for another.

SECTION XIV. Weight of evidence derived from the confession of the accused.

With regard to the weight of evidence derived from the confession of a prisoner, a great difference of opinion exists.

An eminent text writer remarks, that where a confession is voluntary, "it is one of the strongest proofs of guilt; for it cannot be supposed, that a person really innocent would voluntarily subject himself to infamy and punishment." 2 Starkie on Evidence, (Lond. ed. 1842,) 36. And in a later edition of the same work, it is said: "A full confession of guilt, although it be but presumptive evidence, is one of the surest proofs of guilt, because it rests upon the strong presumption that no innocent man would sacrifice his life, liberty, or even his reputation, by a declaration of that which was untrue. The presumption immediately ceases as soon as it ap-

pears that the supposed confession was made under the influence of threats or of promises, which render it uncertain whether the admissions of the accused resulted from a consciousness of guilt, or were wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or of punishment." 1 Starkie on Ev. (Lond. ed. 1853,) 73.

Another text writer, highly commended by Lord Mansfield, C. J., says, "that magistrates cannot be too cautious in receiving confessions, as they very rarely flow from a conscientious desire to offer reparation for the injury committed, but are generally made, either under an implied or express promise of favor, if not extorted by threat or through fear. 1 Burn's Justice, 566, Chetwynd's ed.

Another writer, who had much experience in the administration of criminal law, says, "This kind of evidence I have always found, in the words of that truly learned judge Sir Michael Foster, to be the most suspicious of all testimony." Chetwynd, for many years Chairman of County Sessions.

Mr. Justice Grose, in delivering the opinion of the judges in *Lambe's case*, 2 Leach, C. C. (4th ed.) 552, says, that confessions of guilt, made by a prisoner to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are, at common law, received in evidence, as the highest and most satisfactory proof of guilt, because it is fairly presumed, that no man would make such a confession against himself, if the facts confessed were not true.

The case of *Rex v. Simons*, 6 Carrington & Payne, 541, (1834,) affords a strong instance of the caution with which jurors ought to receive parol evidence of what a prisoner is alleged to have said in the way of confession. It was proposed to give in evidence what the prisoner, who was charged with a capital offence, had been overheard saying to his wife, as he was leaving the magistrate's room after committal; one witness stated, he overheard

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the prisoner say to his wife, "Keep yourself to yourself, and don't marry again." Another witness was called to confirm this evidence, who overheard, at the same time, what the prisoner said, and stated the words to be, "Keep yourself to yourself, and keep your own counsel." Alderson, B., remarked: "One of these expressions is widely different from the other; it shows how little reliance ought to be placed on such evidence."

Another judge, Mr. Justice J. Parke, has more than once observed, that too great weight ought not to be attached to evidence of what one has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement, completely at variance with what the party really did say. 5 Carrington & Payne, 542, note to the case of *Earle v. Picken*.

In Crossfield's trial for high treason, 26 Howell's State Trials, 108, Mr. Adam, speaking of the evidence of confession, observes, "that it is very doubtful in its nature, to be taken with great consideration on all occasions, as a proof of fact or intention. If a fact is proved by an eye-witness, that fact is proved probably, as distinguished from probably; it is proved to the full extent of legal demonstration, because if the witness speaks truth, the fact must be true. But when evidence is given of confession, observe what the nature of it is; the person who gives the testimony may speak truth, and yet the fact may not be true, because the fact does not depend merely upon the statement of another person, who has stated the thing to the witness. This doctrine makes it fit to receive with great deliberation, and even with considerable hesitation and doubt, all evidence of confession. Confessional evidence is such, that the person making the declaration must yet be led by hope on the one hand, or fear on the other, to state circumstances that may make in his favor; and the mind which is to receive the confession, the person to whom it is made, must have an

accurate, distinct understanding, capable of carrying it away with precision, of reporting faithfully without exaggeration or misrepresentation. In all evidence of confession, the nature of it is such, that it is next to impossible to convict for perjury on account of such testimony. What is the security offered by the law, that witnesses shall speak truth in a court of justice? That they come under the terror of a penal prosecution if they do not. A witness, who comes to speak to a confession comes to give evidence to that which, from the very nature of it, cannot be negatived, because it is impossible to swear that a person did not say such or such a thing; all that can be said by a witness is negatively that he did not hear him say it; consequently the person who speaks to the declaration, gives his testimony without those risks of penal proceeding—he is safe from the restraints and terrors of the law.

Blackstone says of this species of evidence that, even in cases of felony, at the common law, "confessions are the weakest and most suspicious of all testimony—ever liable to be obtained by artifice, false hopes, and promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence." So Foster, in speaking of prosecutions for seditious words, says, "words are transient and fleeting as the wind—they are frequently the effect of sudden transport, easily misunderstood, and often misreported."

But whatever difference of opinion exists in respect of the weight which ought to be attached to evidence derived from a confession, yet where it is admissible and satisfactorily proved, it is deemed sufficient by the English law to convict a prisoner even capitally, without the aid of any corroborative testimony of his having committed the offence with which he is charged. This rule has been adopted in a recent case in Georgia, *Stephen v. The State*, 11 Georgia, 225, and in North Carolina, *The State v. Cowan*, 7 Iredell, 239. But in the United States, the weight of authority is, that the prisoner's confession,

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when the *corpus delicti* is not otherwise proved, is insufficient to warrant his conviction. *The State v. Long*, 1 Haywood, 455, (1797); *The State v. Guild*, 5 Halsted, 163, 185, (1828.) But it is to be observed that in these cases there was evidence in corroboration. 1 Greenl. on Ev. § 217. And see *Rex v. Edgar*, 2 Russell, Crim. Law, (3d ed.) 826, note; 2 Hawkins, P. C. ch. 46, § 18.

In *Falkner and Bond's case*, before the judges, Russell & Ryan, C. C. 481, (1822,) there was no evidence of the fact of the felony except the confession of the prisoner; and the only other evidence in the case was to the effect that the prisoner had been desirous to send a message to the prosecutor to keep him away from the trial.

In *Tippel's case* there was no positive evidence that the property had been actually stolen, but there was confirmatory evidence making the theft probable. Most of the judges were of opinion that the jury might have convicted the prisoner upon his confession unconfirmed. Russell & Ryan, C. C. 509. Easter Term, 1823. See also *White's case*, Ibid. 508, decided in the same term, where the evidence was almost the same.

In *Wheeling's case*, 1 Leach, C. C. (4th ed.) 311, note, it is said to have been decided by Lord Kenyon, C. J., that a prisoner may be convicted upon his confession, uncorroborated by any other evidence.

In a modern text-book, Roscoe's Crim. Ev. by Granger, (ed. 1840,) p. 35, *Elbridge's case* before the judges, Russell & Ryan, C. C. 440, (Easter Term,) is cited as establishing the same proposition. But on reference to that case it will be found that there was confirmatory evidence. The prisoner was indicted for stealing a mare, which was seen on the 9th of October, with the prosecutor's servant. On the 11th of the same month, it was not in the prosecutor's possession. On the 13th, the prisoner took the mare to the house of the witness, saying he had been robbed of all his money, and he asked the

witness for a feed of corn. The witness detained the mare for the amount of the feed and other things. The prisoner then offered to sell the mare for £35, which appeared to be a fair value, but he afterwards sold her to another for £12, and a few shillings, the expenses. The judges met in Easter Term, 1821, and were of opinion that there was sufficient evidence to confirm the confession. The same discrepancy of opinion as to the weight of this species of evidence seems to exist on the American bench. In the case of *The Corporation of Columbia v. Harrison*, 2 Reports of the Constitutional Court, (x. s.) 215, Nott, J., says, "a voluntary confession is, in most cases, the highest evidence that can be given." In the case of *The State v. Long*, 1 Haywood, 455, a confession is spoken of as, "from the very nature of the thing, a very doubtful species of evidence." In *Keithler v. The State*, 10 Smedes & Marshall, 229, the court say: "A voluntary confession is entitled to but little weight, as it is but natural that one accused of crime should endeavor to palliate his guilt by excuses."

In another American case, *The State v. Fields*, 1 Peck, 140, the court said, "the evidence of such confessions is liable to a thousand abuses.¹ They are made by persons generally under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world—in chains and degradation—with spirits sunk, fear predominant, hope fluttering around, purpose and views momentarily changing—a thousand plans alternating, and difficulties gathering into a multitude. How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and, for want of an exact representation of the tone of voice, emphasis, countenance, eye,

¹ The confession was admitted in evidence in this case. The prisoner, who was charged with murder, had previously offered to confess, and he was subsequently advised to do so.

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manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning? For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity, or promises of favor, and of any influence, even the minutest."

A modern writer remarks on this subject, that "the imagination need not be taxed for extreme cases, in which silence, equivocation, or even falsehood, the ordinary badges of guilt, would naturally be found in company with perfect innocence. There are many instances in which the truth, properly brought to light, would set free the accused, but his very situation disqualifies him from doing justice to his own statement. Conscious of his rectitude, and proud of his character, he is abashed, humiliated, and confounded by the charge. The untoward chances that have loaded him with suspicion, may go on to his utter ruin; the false witnesses, who have now established a *prima facie* case, may ultimately convince his judges. That he should ever become an object of accusation, would have struck him yesterday as more impossible, than that accusation should now lead to conviction. The last step seems far less violent than the first, and the commencement of his process is a fatal augury, which teaches him to despair of its issue." *Edinburgh Review*, Vol. 40, p. 188, (March, 1824.)

In the administration of the Ecclesiastical Law, great doubt seems to exist in regard to the force of confessions. Sir W. Scott says, (*Williams v. Williams*, 1 Hag-gard, 304,) that "the court must remember, that confession is a species of evidence, which, though not inadmissible, is regarded with great distrust. There is a canon particularly pointed against them, which says, *nec partium confessioni fides habeatur*; and though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on all occasions, to be most accurately weighed."

By the Civil Law, the confession of a party against himself is, in ordinary cases, considered a certain proof of the fact which he owns, unless the contrary truth is established in such a manner as that there might be reason to think that the confession is an effect of folly or stupidity in the person that confesses against himself, that which is false; but in accusations of capital crimes, it is not enough that the party which is accused confesses a crime which is not proved; but other proofs are necessary for putting him to death besides his own confession, which might be an effect of melancholy or despair, or proceed from some other cause than the force of truth. Domat's Civil Law, bk. 4, 658.

In a late text-book the following case is mentioned as having occurred within the personal knowledge of the writer:—Two brothers committed a highway robbery in a dark night, and fled. A younger brother, who was at home, and innocent of the offence, hearing, the next day, that one of the other two was suspected, and, apprehending pursuit, used many artifices to induce a supposition that he was himself the guilty person. He was brought before a magistrate, and in his examination used many equivocal expressions, amounting, in substance, to a virtual confession, which, however, he refused to subscribe. He was committed for trial. On his trial he had no difficulty in proving an alibi on the clearest testimony, and obtaining an acquittal. The brothers, in the mean time, who had actually committed the robbery, had safely arrived in America with the plunder. *Dickinson's Justice of Peace*, 1, 629, note.

"Upon the trial of Richard Coleman, at the Kingston assizes, in March, 1748–9, for the murder of Sarah Green, who had been brutally assaulted by three persons, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the name of Coleman, from which circumstance suspicion soon attached to the prisoners. A person deposed that he met the prisoner at a public-house, and asked him if he knew the woman who had been so cruelly treated, and that he answered "yes—

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what of that?" The witness said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes, I was, and what then?" Or, as another account states, "If I was, what then?" It appeared that the prisoner was intoxicated, and that the questions were put with a view of ensnaring him; but the jury, influenced by this imprudent and blamable language, convicted him, and he was executed. The real offenders were afterwards discovered, and two of them were executed for this very offence, the third having been admitted to give evidence for the crown, and the innocence of Coleman was rendered indubitable." *Remarkable Trials*, 1, 162. See also *Celebrated Trials*, 4, 344. *The King v. Jones and Welsh*. See also *Harrison's case* cited, 1 Leach, C. C. (4th ed.) 264, note; 2 Howell, St. Tr. 1049; 4 Howell, St. Tr. 817; 6 Howell, St. Tr. 647; 8 Howell, St. Tr. 1017.

"Whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, these cases should never be invoked, or so urged as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salu-

tary distinctions, which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is unprofessional and impolitic, and should be regarded as offensive to the intelligence both of the court and jury." *Hoffman's Course of Legal Study*, Vol. I. p. 367, 368.

It appears inaccurate to give to all kinds of confessions the same confidence, or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shades of certainty and probability, from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, suspicious or doubtful expressions.

This note is a reprint, with alterations and additions, from the Dublin edition of 1842, of Mr. Joy's very able Treatise on Confessions, which is cited as authority both in England and America. It was the original intention of the writer of this note to have published an American edition of Mr. Joy's valuable work; but on reflection he has decided to publish his copy in this form. H.

 REX v. JOHN.¹

Easter Term, 1790.

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Whether or not the declarations of the deceased were made under an apprehension of danger must be determined by the judge, in order to receive or reject the evidence, and not by the jury after the evidence is received.

The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound, or illness, or other circumstances indicating the same.

On the prosecution of Thomas John, for the murder of Rachael, his wife, it was proved by the confession of the prisoner himself, in

¹ 1 East, P. C. 357.

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conversation with others, before his wife's death, that in September, 1789, upon a quarrel between them, he had laid hold of his wife, and they had fallen down, he uppermost, and he had given her several violent kicks and blows, so that, according to his own words, he knew she never would raise her hand against him again. It was also proved that she died in the same month; that she was taken ill on a Friday, took to her bed the next day, and died on the Sunday sevensnight following, being confined to her bed by her illness, which was severe, the whole time. But it did not appear that she had expressed any apprehension of danger, though she retained her senses till the day before her death. Three witnesses deposed to conversations during her illness, at which the husband was present, in which she attributed her situation to his ill treatment; and the conduct and answers of the husband were given in evidence, although it was objected, on his behalf, that what was said by the wife, even in the presence of the husband, and to which he returned answers tending to charge himself, ought not to have been received. Evidence was also given of her declarations in the prisoner's absence, after she was confined to her bed, all of which tended to show the circumstances of violence he had committed upon her. It was objected, that the declarations of the wife, in the absence of the prisoner, ought not to have been admitted in evidence, as it was not proved that she considered herself at the time as a dying person, the evidence not being express on that head; but that, if the evidence were admissible, it ought to have been left to the jury to consider whether the wife were at the time conscious of approaching death. Objection was also made, that these being declarations of a wife against her husband, were not, on that account, evidence.

The court was of opinion, that the reason of the rule, that a wife shall not be admitted to give evidence against her husband, did not apply to this case. And upon the other point, that the evidence of the state of the wife's health, at the time the declarations were made, was sufficient to show that she was actually dying; and that it was to be inferred from it that she was conscious of her situation; and no particular direction was given to the jury on the subject.

The jury having found the prisoner guilty, these points were referred to the judges, who, at a conference in Easter Term, 1790, all agreed that it ought not to be left to the jury to say whether the deceased thought she was dying or not; for that must be decided by the judge before he receives the evidence. And if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. But as to the declara-

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tions themselves in this case, all the judges, except two, thought that there was no foundation for supposing that the deceased considered herself in any danger at all.

REX v. MEAD.¹

Hilary Term, 1824.

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Defendant having been convicted of perjury, a rule *nisi* for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and, on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: *Held*, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration.

THE defendant was indicted for perjury, and at the Middlesex sittings, after Michaelmas Term, 1822, before ABBOTT, C. J., was found guilty. In Hilary Term, 1823, a rule for a new trial was obtained by the *Attorney-General*, on the ground of the verdict having been against the weight of evidence and upon affidavits.

D. F. Jones and *Chitty* now showed cause, and, amongst others, tendered affidavits, stating a dying declaration of James Law, the prosecutor, who was shot by the defendant after the conviction. The perjury assigned, and of which the defendant was convicted, consisted in Mead's swearing, upon the trial of an information in the Exchequer, that Law had been present at and engaged in a smuggling transaction, at a place called the Salt-Pans, in the parish of Scalby, in the county of York, on the 20th August, 1820, and upon the trial of which information Law was acquitted. The dying declaration of Law, after giving an account of the circumstances under which he was shot by Mead, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to by Mead in the Court of Exchequer.

The *Attorney-General*, *Clarke*, *Gurney*, and *Walton*, objected to these affidavits of the dying declaration being received. Dying

¹ 2 Barnewall & Cresswell, 605; 4 Dowling & Ryland, 120.

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declarations are only admissible in criminal prosecutions, where the death of the deceased, and the circumstances of the death, are the subject of the charge against a prisoner; whereas here the statement, disclosed by the affidavits tendered, was not made with reference to the death of the dying man, but with reference to the antecedent charge of perjury. In *Doe dem. Sutton v. Ridgeway*, 4 B. & A. 53, it was held that the dying declarations of a person, as to the relationship between the lessor of the plaintiff and the person last seised, could not be received in evidence.

D. F. Jones and Chitty, contra, contended, that the affidavits as to the dying declarations were admissible. The general principle, upon which such evidence is competent, is founded partly on the situation of the dying man, which must be taken to have as much power over his conscience as the sanction of any oath could have, and partly on the manifest absence of any interest, when he is on the point of passing into another world. Lord *Mohun's case*, 12 St. Tr. 949; *Rex v. Reason*, 1 Str. 499; *Tinkler's case*, 1 East, P. C. 354; 2 Hume's Com. on the Law of Scotland respecting Crimes, 391. The rule contended for on the other side, limiting evidence of this kind to cases of inquiry as to the cause or circumstances of death, is much too narrow; for in *Wright d. Clymer v. Littler*, 3 Burr. 1244, evidence of a dying confession, by the subscribing witness to a deed, was held to be admissible. So also in the case before Heath, J., cited in *Arison v. Lord Kinnaird*, 6 East, 195, the confession of an attesting witness to a bond, who, in his dying moments, begged pardon of heaven for having been concerned in forging the bond, was received. Secondly, there was a connection, in this case, between the transaction to which the dying declaration referred and the occasion of the death. The false accusation, to which the dying declaration referred, was the foundation of the personal hostility which led to the death. Thirdly, whether it would have been evidence on the trial or not, it may be received for the purpose of satisfying the court upon the question of granting a new trial, in the same way as affidavits by parties themselves are received on similar occasions.

ABBOTT, C. J. We are all of opinion that the evidence cannot be received. In the case before Mr. Justice Heath, the declaration amounted to a confession by the party himself of a very heinous offence which he had committed. The same observation applies to the case of *Wright v. Littler*. Here, the dying declaration of Law was for the purpose, not of accusing but of clearing himself. It therefore falls, not within the exception on which those decisions proceeded, but within the general rule, that evidence of this description

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is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration.¹

The affidavits were rejected.

¹ The same point was ruled in *Rex v. Hutchinson*, tried before Bayley, J., at the Durham Spring Assizes, 1822. The prisoner was indicted for administering savi to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead; and, for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.

There is an exception, in the law of evidence, to the general rule rejecting hearsay, in the case of declarations made by a person under the apprehension of approaching dissolution. The principle upon which this exception stands, is clear and obvious. "It is presumed that a person, who knows that his dissolution is fast approaching, that he stands on the verge of eternity, and that he is to be called to an immediate account for all that he has done amiss, before a Judge from whom no secrets are hid, will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath." ¹ Starkie on Ev. (London ed. 1853,) 32. This principle was thus elegantly stated by Lord Chief Baron Eyre: "They are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the

mind is induced, by the most powerful considerations, to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." *Rex v. Woodcock*, 1 Leach, C. C. (4th ed.) 502.¹

These declarations are admitted to be proved, although the party against whom they are offered was not present, and, therefore, had not an opportunity to cross-examine and elicit the whole of the truth. But as this is an exception to a rule which is in general to be considered as absolutely essential to the ascertainment of truth, it is to be received with the greatest caution, and is never admitted unless the court be first satisfied that the party who made the declaration was under the impression of approaching death; and so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and renders such

¹ Shakspeare, in *King John*, quoted in 1 Taylor on Ev. § 499, has put the same sentiment into the mouth of the wounded Melun, who, finding himself disbelieved while announcing the intended treachery of King Lewis, exclaims:—

"Have I not hideous death within my view,
Retaining but a quantity of life;
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false; since it is true,
That I must die here, and live hence by truth?"

Act 5, Scene 4.

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declarations admissible in no civil case,¹ and, in criminal cases, only in the single instance of homicide, when they relate to the cause of death, and are tendered on a criminal charge respecting it. *Wilson v. Boerem*, 15 Johnson, 286; *Doe v. Ridgway*, 4 Barnewell & Alderson, 53; *The State v. Cameron*, 2 Chandler, 172. Thus, on a trial for robbery, the dying declaration of the party robbed has been rejected. *Rex v. Lloyd*, 4 Carrington & Payne, 233. And, on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who, on his death-bed, confessed that he had committed the crime. *Rex v. Gray*, Irish Circuit Reports, 76. But in one case, "the judges appear to have intrenched somewhat upon this rule." On the trial of an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. *Rex v. Baker*, 2 Moody & Robinson, 53, (1837.) In this case, Colman, J., after consulting Parke, B., was of opinion, that as it was all one transaction, the declarations were admissible, and allowed them to go to the jury, but said he would reserve the point for the opinion of the judges; but the prisoner was acquitted.

It has been repeatedly held, that the rule of the common law, by which this species of evidence is admitted, is not in conflict with, nor repealed by, the general rule of criminal law declared in the Constitution of the United States, and in the Constitutions and Statutes of nearly all the States in the Union, that "the accused shall enjoy the right to be confronted with the witnesses against him." *Anthony v. The State*, Meigs, 265, (1838); *Woodside*

v. The State, 2 Howard, (Miss.) 655, (1837); *The State v. Tilghman*, 11 Iredell, 513, (1850); *Commonwealth v. Carey*, 4 The Monthly Law Reporter, (N. S.) 169, (1851); *Campbell v. The State*, 11 Georgia, 353, (1852); *McDaniel v. The State*, 8 Smedes & Marshall, 401, 416. But see *contrà*, 4 The Monthly Law Reporter, (N. S.) 221. In *Anthony v. The State*, ubi supra, this principle was clearly stated as follows, by Reese, J.: "The Bill of Rights cannot be construed to prevent declarations properly made in articulo mortis from being given in evidence against defendants in cases of homicide. The provision in the Bill of Rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of our Revolution, had been yielded to the liberal or popular party in Great Britain after a long contest, and after very strenuous opposition from the crown, from crown lawyers, and, if I may so speak, crown statesmen. In this case, as in that of libels and some others, the object of the Bill of Rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest. That our view of this question is correct, is made manifest by the fact, that after more than forty years from the adoption of our first Constitution, this argument against the admissibility of dying declarations, on the ground of the Bill of Rights, is for the first time made, so far as we are aware, in our courts of justice; and, if made elsewhere, it does

¹ It was even held, that the dying declarations of a pauper respecting his settlement were admissible, though that question involved both law and fact. *Rex v. Bury St. Edmund's*, Caldecott, 486; *Abbot v. Dunnell*, 2 Bott, 80. And in *Stobart v. Dryden*, 1 Meeson & Welsby, 615, 627, the dying declarations of a deceased subscribing witness to a forged instrument were offered in disparagement of the evidence afforded by his signature, but were rejected. In *Rex v. Reason*, 1 Strange, 722; 16 Howell's State Trials, 1, (1722,) which is the earliest reported case on this subject, Sir John Strange says: "We who were counsel for the king offered to give in evidence several declarations, made by the deceased on his death-bed, whereby he charged the defendant with barbarously murdering him, and, without much hesitation, the court let us into that evidence."

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not appear to have received judicial sanction in any State."

The principle upon which this species of evidence is received being, "that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath," per Curiam, in *Rex v. Drummond*, 1 Leach, C. C. (4th ed.) 337, 338, it follows, that if the declarant was too young to comprehend the obligation of an oath, *Rex v. Pike*, 3 Carrington & Payne, 598; *Regina v. Perkins*, 2 Moody, C. C. 135; 9 Carrington & Payne, 395; or was incompetent by reason of infamy, *Rex v. Drummond*, ubi supra, or imbecility of mind, his dying declarations are inadmissible. Upon the same principle, it would seem to be allowable to show, that the deceased was not of a character likely to be impressed by a religious sense of approaching death. 1 Phillipps on Ev. (Lond. ed. 1843), 289.

The dying declarations of an accomplice are admissible; but they are only admissible where the prisoner is charged with assisting in the self-destruction of the deceased, for the reason, that dying declarations are never admissible, except where the death of the person who made them is the subject of the indictment. *Rex v. Tinckler*, 1 East, P. C. 354. And see the material parts of this case as reported in the Black Book, and a MS. note of Lord Denman's, in the Preface to the first volume of Denison's Crown Cases.

These declarations are admissible in evidence, if it appear to the satisfaction of the court, *Rex v. Hucks*, 1 Starkie, Rep. 521, 523; *Bartlett v. Smith*, 1 Meeson & Welsby, 483, 486; *Rex v. Van Butchell*, 3 Carrington & Payne, 629; *The State v. Poll*, 1 Hawks, 442, 444; *Lambeth v. The State*, 23 Mississippi, 322, 354; *Hill v. The Commonwealth*, 2 Grattan, 594; *Commonwealth v. Murray*, 2 Ashmead, 41, first, that at the time when they were made the declarant was in actual danger of death; secondly, that he should then have had a full apprehension of his danger; and, lastly, that death should have ensued. 1 Taylor on Ev. § 503. In the *Sussex*

Peerage case, 11 Clark & Fennelly, 108, 112, Lord Denman, C. J., stated this principle as follows: "With regard to declarations made by persons in *extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence; but all these things must concur, to render such declarations admissible. Such evidence ought to be received with caution, because it is subject to no cross-examination."

It is not necessary that the declarant should actually express any apprehension of danger, provided it satisfactorily appears to the court, in any mode, that the declarations were made under a clear impression of impending death. And for this purpose all the circumstances of the case may be shown, which may tend to throw light upon the state of the mind of the deceased at the time when the declarations were made. If the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct in settling his affairs, disposing of his property, taking leave of his relations and friends, giving directions respecting his funeral or as to his place of burial, receiving extreme unction, or the like, it is sufficient. *Rex v. Woodcock*, 1 Leach, C. C. (4th ed.) 500; *Rex v. Bonner*, 6 Carrington & Payne, 386; more fully reported in 2 Russell, Crim. Law, (3d ed.) 759; *Rex v. Mosley*, 1 Moody, C. C. 97; *Minton's case*, McNally on Ev. 386; *Regina v. Howell*, 1 Denison, C. C. 1; 1 Carrington & Kirwan, 689; 1 Cox, C. C. 151; *Regina v. Mooney*, 5 Cox, C. C. 318; *Regina v. Thomas*, 1 Cox, C. C. 52; *Anthony v. The State*, Meigs, 265; *Nelson v. The State*, 7 Humphreys, 542; *Commonwealth v. Murray*, 2 Ashmead, 41; *Commonwealth v. Williams*, 2 Ashmead, 69; *McDaniel v. The State*, 8 Smedes & Marshall, 401; *Campbell v. The State*, 11 Georgia, 353; *McLean v. The State*, 16 Alabama, 672, 674; *Dunn v. The State*, 2 Pike, 229; *Hill v. The Commonwealth*, 2 Grattan, 594. And see *Regina v. Dalmas*, 1 Cox,

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C. C. 95; *Regina v. Scallan*, Crawford & Dix, Abr. Cases, 240; *Regina v. Qualter*, 6 Cox, C. C. 357; *Regina v. Nicolas*, 6 Cox, C. C. 120; *Regina v. Megson*, 9 Carrington & Payne, 418.

In *Rex v. Spilsbury*, 7 Carrington & Payne, 187, it was proposed to give in evidence the dying declaration of a deceased person, and it was proved that, about the time of making the declaration, the deceased was asked if he thought he should recover, and how he was; to which he answered, that he thought he should not recover, as he was so very ill. He had been previously insensible, but remained sensible for an hour, and died the next day. The evidence was rejected, on the ground that the judge did not feel fully convinced that the deceased had no hope of recovering. The learned judge observed, that people very often use expressions, to the effect that they shall not recover, who have no conviction that their death is near approaching; and that if the deceased had felt that his end was drawing very near, he should have expected him to say something of his affairs, or of those who were to have his property, or to give some directions as to his funeral, or that he would have used some other expressions, showing a feeling or conviction that his death was at hand. "This decision must, it is conceived, be considered only with reference to the peculiar circumstances of the individual case; but it may properly be regarded as an authority to this extent, that, in general, the conduct and demeanor of the deceased, and not merely what he says respecting his condition, may be considered for the purpose of determining whether it is proper to receive his declarations." 1 Phillipp's on Ev. (Lond. ed. 1843,) 285.

With respect to the interval of time which may have elapsed between the uttering of dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone; nor is it consistent with the principle upon which dying declarations are received in evidence, (which, as we have seen, depends upon the state of the declarant's mind,) that such declarations should be excluded, if not made

within any precise limits of time. It ought, however, to appear that the deceased believed his dissolution to be impending. "It is the impression," says Professor Greenleaf, "of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." 1 Greenl. on Ev. § 158. And unquestionably the length of time may be a material consideration in forming an inference as to the state of mind of the deceased, with respect to his expectation of death at the time of making a declaration, especially if he has not expressed his sense of his own situation. 1 Phillipp's on Ev. (Lond. ed. 1843,) 285. In *Woodcock's case*, 1 Leach, C. C. (4th ed.) 500, the declarations were made forty-eight hours before the death. In *Tinckler's case*, 1 East, P. C. 354, some of them were made ten days before the death. In *Rex v. Mosley*, 1 Moody, C. C. 97, they were made eleven days before the death. In *Rex v. Bonner*, 6 Carrington & Payne, 386, they were made three days before death, and were all received. In *Rex v. Van Butchell*, 3 Carrington & Payne, 629, they were made seven days before the death, and rejected. 2 Russell on Crimes, (3d ed.) 753, note. See *McDaniel v. The State*, 8 Smedes & Marshall, 416.

Any hope of recovery, however slight, existing in the mind of the declarant at the time of making the declarations, will render them inadmissible. "To render a declaration of this kind admissible, the deceased must have had the impression on his mind of an almost immediate dissolution." Per Bosanquet, J., in *Rex v. Crockett*, 4 Carrington & Payne, 544. And although the declarant may think that he shall ultimately "never recover," still this is not sufficient to dispense with the obligation of an oath, unless the declarations "are made under an impression of almost immediate dissolution." Per Hullock, B., in *Rex v. Van Butchell*, 3 Carrington & Payne, 631. And see *The State v. Poll*, 1 Hawks, 442; *Vass v. The Commonwealth*, 2 Leigh, 786; *Smith v. The State*, 9 Humphreys, 24; *Rex v. Murphy*, 1 Irish Circuit Rep. 38; *Rex v. Errington*, 2 Lewin, C. C. 148. In *Rex v. Crockett*,

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ubi supra, "notwithstanding a surgeon told the deceased that there was no chance of her recovery, yet, as she said, that she hoped the surgeon would do what he could for her, for the sake of her family, the judge rejected the declarations of the deceased, saying that her expressions showed a degree of hope in her mind. In *Rex v. Fagant*, 7 Carrington & Payne, 238, it appeared that the deceased had expressed an opinion that she should not recover, and after that she made a declaration, but subsequently, on the same day, she asked her nephew if he thought she would "rise again." It was considered, that the declaration was not receivable, because the subsequent question showed that she entertained hopes of recovery.

Representations made to the deceased are often of importance in inquiring as to the opinions he entertained of his own danger. In *Welbourn's case*, who was indicted for the murder of Elizabeth Page, by inducing her to take poison, the declaration of the deceased was made to an apothecary within an hour of her death, in consequence of the apothecary telling her that he must know what she had done, and that she would not live twenty-four hours unless proper relief was afforded. The majority of the judges were of opinion that the declaration was inadmissible, because the deceased was given to understand, that if she told what was the matter with her, she might have relief and recover. 1 East, P. C. 358. So in the case of *Rex v. Christie*, 2 Russell on Crimes, (3d ed.) 754, where the deceased asked his surgeon if the wound was necessarily mortal, and was told, in answer, that persons had recovered under like circumstances, but that the case was one of extreme danger; a statement made immediately after this conversation was rejected by Chief Justice Abbott and Parke, J., on the ground that the language of the surgeon was calculated to keep up in the mind of the deceased some expectation of recovery.

In *Rex v. Mosley*, 1 Moody, C. C. 27, the deceased received the injury of which he died on the evening of the 30th of September, and died on the evening of the

10th of October following. On the first evening, and every day until his death, he complained to the nurse who attended him that he should never get better. But during his illness he never expressed any opinion, either of hope or apprehension, to his surgeon. The surgeon informed him that his case was hopeless, for the first time, on the morning of the 10th of October. The surgeon did not himself consider the case quite hopeless till that day, and had always previously told the deceased that there was danger, but that there were hopes of his being better. The judges were unanimously of opinion, that the declarations of the deceased, made by him after he was brought home the first evening, after he had said that he should not get better, and also at different times during his illness, and previous to the surgeon's communications to him of his hopeless state, were properly received in evidence. "It may be observed," says Philipps, "that this case is distinguishable from the two preceding, on the ground that there was positive evidence that the conviction of the deceased, as to his own impending death, had not been altered by the representations of the surgeon." 1 Philipps on Ev. (London ed. 1843,) 288.

In *Rex v. Hayward*, 6 Carrington & Payne, 160, after a surgeon had examined the wound of the deceased, the deceased inquired whether he was in danger; to which the surgeon answered that he was, and that the only chance of his living was keeping himself quiet; upon which it was contended that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements; but that, upon the surgeon's statement, he must be taken to have had some hope of recovery. On this, the Lord Chief Justice observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of making the declarations, would undoubtedly render the proof of such declarations inadmissible. But, upon the further examination of the surgeon, it

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appeared that, before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previously to the receiving of his declarations, desired him, as a dying man, to tell the truth; and that the deceased replied he would. Upon this further evidence,* the declarations of the deceased were held to be admissible, and were laid before the jury."

"It is worthy of remark," says Mr. Taylor, "that in Scotland it is immaterial, except as regards the *weight* of the evidence, whether or not the declaration be made under the impression of impending death; but where a party has received a mortal wound, an account of the matter given by him at a time subsequent to the inquiry will be admissible in the event of his death, provided it were made seriously and deliberately, and whilst the deceased appeared to be aware of what he was doing, and in the possession of his faculties." 1 Taylor on Ev. § 504, citing Alison, Prac. Crim. Law, 510-512, 604-607; 2 Hume, Comm. 391-393.

The declarations of the deceased are admissible only to those things to which he would have been competent to testify, if sworn in the case. See *Oliver v. The State*, 17 Alabama, 587. They must, therefore, in general, speak to facts only, and not to mere matters of opinion. *Rex v. Sellers*, Carrington's Supp. 233. And must be confined to what is relevant to the issue. See *Johnson v. The State*, 17 Alabama, 618. It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the validity and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitations. *Vass v. The Commonwealth*, 3 Leigh, 786; *Rex v. Fagant*, 7 Carrington & Payne, 238. But where a statement, ready written, was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was

rejected in Ireland, by Mr. Justice Crampton, who observed, that "in the state of languor in which dying persons usually are, their assent could easily be got to statements, which they never intended to make, if they were but ingeniously interwoven by an artful person, with statements which were actually true." And his lordship added: "The magistrate should not have trusted to the relation of a third person, but should have taken down the deceased's declaration from her own lips, or at least have had it taken down in his presence." *Rex v. Fitzgerald*, Irish Circuit Rep. 168, 169. But whatever the statement may be, it must be complete in itself; and if it appears that the declarations were intended by the declarant to be connected with and qualified by other statements, material to the completeness of the narrative, and that this was prevented by interruption or death, so that the narrative was left incomplete and partial, the evidence is inadmissible. *Vass v. The Commonwealth*, 3 Leigh, 787; 1 Taylor on Ev. § 505; 1 Greenleaf on Ev. § 159.

In Massachusetts, it has very recently been decided that this species of testimony may be given by signs. *Commonwealth v. Casey*, 6 The Monthly Law Reporter, (N. S.) p. 203. In this case, the declarant, being at the point of death and conscious of her situation, and unable to articulate by reason of the wounds she had received, was asked to say whether the prisoner was the person who had inflicted the wounds, and, if so, to squeeze the hand of the interrogator, and she thereupon squeezed his hand; it was held, that this evidence was admissible and proper for the consideration of the jury. Chief Justice Shaw said: "In regard to the admissibility of the signs made by the deceased, in reply to the questions put to her, it is to be observed that all words are signs; some are made by the mouth, and others by the hands. There was a civil case, tried in Berkshire county, where a suit was brought against a railroad company, and the question was, whether a female who was run over survived the accident for any length of time. She was unable to speak, but was asked, if she had consciousness, to

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press their hands, and the testimony was admitted. If the injured party had but the action of a single finger, and with that finger pointed to the words 'yes' and 'no,' in answer to questions, in such a manner as to render it probable that she understood, and was at the same time conscious that she could not recover, then it was admissible evidence. It is, therefore, the opinion of the court, that the circumstances under which the responses were given by the declarant, to the questions which were put to her, warrant that the evidence should be admitted; but it is for the jury to judge of its credibility, and of the effect which shall be given to it."

If the witness is unable to state the precise language used, the substance of the declarations may be given in evidence. *Montgomery v. The State*, 11 Ohio, 424; *Ward v. The State*, 8 Blackford, 101. And see *Nelms v. The State*, 11 Smedes & Marshall, 500, 507. Where a declaration in articulo mortis was reduced to writing, and signed by the party, the judge refused to receive either a copy of the paper or parol evidence of the declaration. *Rex v. Gay*, 7 Carrington & Payne, 280; *Trowler's case*, 1 East, P. C. 356. In *The State v. Ferguson*, 2 Hill, (S. Carolina,) 607, 624, the deposition had been read to the deceased, and his declaration was, that "it was as nigh right as he could recollect the circumstances." "If the declaration is taken alone," said Johnson, J., "and unconnected with the deposition, it is unintelligible and unmeaning; but, when taken in connection with it, we have a distinct affirmation of the truth of the contents of the deposition, containing in itself a concise and clear statement of the circumstances under which the mortal wound was inflicted. And that the deposition was admissible follows from the general rule, that declarations are to be taken altogether, and not garbled by suppressing any part of what was said at the time. The contents of the deposition was as much a part of the declarations of the deceased as the words which he uttered. The reading of the deposition itself was admissible, as containing better evidence of the contents than could be supplied by

parol; and in *Trowler's case*, cited in 1 East, P. C. 356, parol evidence of dying declarations, which had been reduced to writing, were rejected, on the ground that the writing itself was higher evidence." Where two such declarations were made, the second of which alone was reduced to writing in the presence of a magistrate, this written declaration, not being forthcoming at the trial, the judges held that, in the absence of it, the first declaration was admissible in evidence. *Rex v. Reason*, 1 Strange, 499; 16 Howell's State Trials, 1, 24, et seq. If the statement of the declarant has been taken on oath before a magistrate, but is inadmissible as a deposition, by reason of non-compliance with statute requisitions, it is still admissible as a declaration in *extremis*, if taken under such circumstances as would render such a declaration receivable in evidence. *Rex v. Woodcock*, 1 Leach, C. C. (4th ed.) 500; 1 East, P. C. 356; *Rex v. Dingler*, 2 Leach, C. C. (4th ed.) 561; *Rex v. Callaghan*, McNally on Ev. 365; *The State v. Arnold*, 13 Iredell, 184. And it need not show on the face of it that it was made under circumstances which would render it admissible as a dying declaration; that it is a fact *dehors* the statement, and may be proved by parol testimony. *Regina v. Hunt*, 2 Cox, C. C. 239.

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favor. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better, and afterwards said, "I don't think he would have struck me if I had not provoked him;" Coleridge, J., at first expressed some doubt whether he ought to receive the statement, but afterwards received the evidence, observing that it might have an influence on the amount of punishment. *Rex v. Scaife*, 1 Moody & Robinson, 551; 2 Lewin, C. C. 150; *Moore v. The State*, 12 Alabama, 764. The dying declarations of either the husband or wife are admissible, where the other party is charged with the murder of the declarant. *The People*

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v. Green, 1 Denio, 614; *Moore v. The State*, 12 Alabama, 764; *Pennsylvania v. Stoops*, Addison, 381. See *Rex v. Woodcock*, 1 Leach, C. C. (4th ed.) 500; *Rex v. John*, in the text.

It should be observed, that the principles above considered "apply only to declarations offered on the sole ground that they were made in *extremis*; for where they constitute part of the *res gestæ*, or come within the exception against interest, or the like, they are admissible, as in other cases, irrespective of the fact, that the declarant was under apprehension of death." 1 Greenleaf on Ev. § 156. Thus, the declarations of a person who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, are admissible in evidence, as a part of the *res gestæ*. *Commonwealth v. M'Pike*, 3 Cushing, 181. See *Rex v. Foster*, 6 Carrington & Payne, 325; *Commonwealth v. Hill*, 2 Grattan, 594.

The following observations on the effect of this species of testimony, in Philipps on Evidence, Vol. I. (London ed. 1843,) 292, are worthy of attention: "With respect to the effect of dying declarations, it is to be observed that although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence, to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence, may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But, it cannot be concealed, ani-

mosity and resentment are not unlikely to be felt in such a situation. The passion of anger, once excited, may not have been entirely extinguished, even when all hope of life is lost. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; more especially when it is considered that they cannot be subjected to the power of cross-examination,—a power quite as necessary for securing the truth, as the religious obligation of an oath can be.

The remark often made on verbal statements, which have been heard and reported by witnesses, applies equally to dying declarations, namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding, or from infirmity of memory. In one of the cases upon the subject, this species of proof is spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries." By Coleridge, J., in *Rex v. Spilsbury*, 7 Carrington & Payne, 190.

When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath; yet they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different; and, therefore, the accused is entitled to every allowance and benefit that he may have lost, by the absence of the opportunity of more full investigation by the means of cross-examination. *Rex v. Ashton*, 2 Lewin, C. C. 147, per Alderson, B.

It may be added, also, that the deceased, in many cases, is laboring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of

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calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator. 2 Russell, Crim. Law, by Greaves, 767. "Credit is not always due to the declarations of a dying person," said Livingston, J., in *Jackson v. Kniffen*, 2 Johnson, 35, 36, "whose body may have survived the powers of his mind, or whose recollection, if his senses are not impaired, may not be very perfect, or who, for the sake of ease, and to get rid of the impotunity and teasing of those around him, may say, or seem to say, whatever they choose to suggest." H.

REX v. THE INHABITANTS OF ALL SAINTS, WORCESTER.¹

May 3, 1817.

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On a question of settlement, the pauper having been removed to her maiden settlement, respondents called A. to prove her marriage with C., in order to get rid of the effect of a subsequent marriage of C. with the pauper: *Held*, that A. was a competent witness, for C. not having been called as a witness, she did not contradict him, and her evidence could not be used to criminate him.

UPON appeal, the sessions confirmed an order for the removal of Esther Newman, otherwise Esther Willis, from the parish of Cheltenham, in the county of Gloucester, to the parish of All Saints, in the city of Worcester, subject to the opinion of this Court, on the following case:—

The appellants having produced the pauper, the counsel for the respondents began their case by calling a witness, named Ann Willis, for the purpose of proving that she had been married in Ireland, to one George Willis. The counsel for the appellants objected to the competency of this witness, declaring themselves prepared with evidence of the subsequent marriage of the same George Willis to Esther, the pauper; but the Court determined to admit the witness. She proved her own marriage to George Willis, about fourteen years ago, and that a paper, which she stated to be a certificate of that marriage, had been given her by the minister, and by her to a Mr. Farren, the overseer of the parish where she then resided, and Farren was in court, ready to prove his having received the said certificate of the said witness, and having lost it, and he was ready also to have given parol testimony of its contents. Another witness

¹ 6 Maule & Selwyn, 194.

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proved that George Willis and the first witness cohabited together as man and wife, and had three children then alive; that the settlement of the said George Willis was in the parish of Sandhurst, where he was born; that he had been lately apprehended as a vagrant, for leaving the said Ann, his wife, chargeable to that parish, and convicted of that offence at the quarter sessions for this county; that Esther, the pauper, had gained a settlement in the appellant's parish in her own right, as a single woman, about three years ago, but had since, on the 28th December, 1815, married the said George Willis; which fact was proved, as well by the said pauper as by another witness, who was present at their marriage. The counsel for the appellants submitted to the Court that the evidence of Ann Willis should be struck out, which the Court refused.

Scarlett and Campbell, in support of the order of sessions, argued that Ann Willis was a competent witness to prove her marriage with George Willis; and they said, that in order to maintain this position, it was not necessary to dispute the rule, that husband and wife cannot be witnesses for each other nor against each other, Bull. N. P. 286, provided the rule were limited to cases where the interest of husband and wife is the matter in controversy, as where either of them is party to the record. *Bentley v. Cooke*, cited in *Rex v. Cliviger*, 2 T. R. 265. But suppose an issue between A. and B., and A. calls a witness, who proves certain facts, and also calls the wife of that witness, with a view of confirming his evidence; if the wife, instead of confirming, should contradict her husband, this testimony, according to the argument below at the sessions, must be rejected, otherwise it may tend to show her husband guilty of perjury. But would it not be a strange anomaly in the law, if the competency of a *feme covert* to be a witness should depend upon whether her evidence would or would not agree with the evidence of her husband, his interest not being in litigation? It seems, indeed, as if some such doctrine had led to the decision of *Rex v. Cliviger*, 2 T. R. 263, where, upon a question touching the settlement of A. and B. his wife, A. having denied a former marriage with C., C. was held an incompetent witness to prove that marriage. Or, if that was not the ground of the decision, it was, perhaps, upon the principle that husband and wife shall not give evidence which may tend to criminate each other; a principle upon which the ruling of Holt, C. J., in *Broughton v. Harpur*, 2 Lord Raym. 752, was probably bottomed, though the report puts it on the ground of interest. But, in either way of considering it, the decision in *Rex v. Cliviger* cannot avail, except in cases where the interest of husband or wife is concerned in the issue. With respect to the wife's contradicting the

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husband, it may be observed here, that the husband had not given evidence, as in the case of *Rex v. Cliviger*; so that the fact did not admit of this objection.

Jervis, Taunton, and Twiss, contra, argued that *Rex v. Cliviger* was decisive of this question; for although, in that case, the husband was one of the parties included in the order of removal, and had been called as a witness, and denied his former marriage, in which respect it differs from the present case, yet, having been decided upon the principle that the law does not permit husband and wife to give evidence that may even tend to criminate each other, that decision entirely disposes of the present case. In delivering judgment, Ashhurst, J., is reported to have said, that "a marriage in fact had been proved with one woman, then another woman was called to prove that she had been before married to him, and was his lawful wife." So, in substance, is the case at bar; for although the respondents, contrary to the usual course of proceeding, by first examining the pauper, who would have proved her marriage, began by calling the first wife, to prove that she had before been married to and was the lawful wife of the same man, yet this course of examining the witnesses *inverso ordine*, and by a kind of shift, to evade the rule of law, will not alter the nature of the evidence; for that would be to make the rule of law dependent upon the order observed in marshalling the evidence. When, therefore, it appeared in the sequel that the evidence had been improperly received, the justices should have struck it out. The case of *Broughton v. Harpur* is in accordance with *Rex v. Cliviger*; and it is also laid down by Lord Hale, (Hale, P. C. 301,) that a wife is not bound to give evidence against a third person, if her husband be concerned, though it be not directly against him. It is not necessary, upon the present occasion, to carry the doctrine so far, because here the wife's testimony might directly have affected her husband; for the justices might, upon that testimony, have issued a warrant for his apprehension. As where upon issue joined in a civil action, whether felony or not, if the affirmative be found, such finding will, it is said, lay a good foundation for proceeding criminally against the party.

LORD ELLENBOROUGH, C. J. With the best attention I have been able to give to this case, I cannot discover any incompetence of the first wife to give evidence touching the fact of her marriage. At the period of the proceeding, when she was called, she contradicted no denial then in evidence of the existence of the marriage, nor do I say that it would make any material difference if she had. At the time

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when she proved the fact of marriage, it did not appear that guilt would thereby be imputable to her husband. She did not refuse to be examined; and she proved the fact of the celebration of a marriage fourteen years before, with a person under whom the pauper's title to a settlement was to be derived. She affirmed that he was her husband. How does this criminate him? Does it contradict any thing which he had sworn to before, so as to involve him in the crime of perjury? Not at all. Does it even relate to a matter on which he had given previous evidence? By no means. Then the question is, whether this is not a competent witness to prove her marriage in the first instance? Her being the wife presents no objection to her proving the marriage. * * The objection rests only on the language of *Rex v. Cliviger*, that it may tend to criminate him; for it has not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. The passage from Lord Hale has been pressed upon us, where it is said the wife is not bound to give evidence against another in a case of theft, if her husband be concerned, though her evidence be material against another, and not directly against her husband. Admitting the authority of that passage, it assumes that the husband was under the criminal charge, that he was included in the *simul cum aliis*. But if we were to determine, without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may, perhaps, go to form a link in a complicated chain of evidence against him, such a decision as I think would go beyond all bounds, and there is not any authority to sustain it, unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in *Rex v. Cliviger*, may be supposed to do so. * * I would observe that, by the present decision, the Court does not mean to break in on the rule, founded in the policy of the law, that husband and wife shall not be permitted to be witnesses for or against, or to criminate each other; but before I pronounce that it is a good objection to the competency of either to be a witness, that his or her testimony may produce some latent possible effect, which, in its result, may occasion an inconvenience to the other, I shall require some graver authority or reason than I am acquainted with at present. It may be remarked here, that at the stage of the inquiry when this witness was examined, it was not in proof that the second marriage had taken place; undoubtedly, therefore, she was an unexceptionable witness at that time. To strike out her evidence, because by reason of what was afterwards proved, of the possible inconvenience which might result to her husband from the disclosure, would, in my opinion, be

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introducing a dangerous laxity in dealing with evidence. It would reduce all prior evidence in a cause to a precariousness dependent upon that which follows, whether it should remain part of the evidence on the notes or not. It seems to me, therefore, that the evidence was well received at the time when it was produced, and that the subsequent testimony did not render the witness incompetent, so as to strike out her evidence *ab initio*.

BAYLEY, J. On the best consideration which I can give to this case, it appears to me that Ann Willis was a competent witness; and I found this opinion not upon the order of time in which she was called, for, in my judgment, she would have been equally competent after the second wife had given her testimony. It does not appear that she objected to be examined, or demurred to any question. If she had thrown herself on the protection of the Court, on the ground that her answer to the question put to her might criminate her husband, in that case, I am not prepared to say that the Court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the Court. But, as she did not object, I think there was no objection arising out of the policy of the law; because, by possibility, her evidence might be the means of furnishing information, and might lead to inquiry, and perhaps to the obtaining of evidence against her husband. It is no objection to the information, that it has been furnished by the wife. In *Rex v. Cliviger*, the decision seems to have been put upon two grounds; one, that the husband having been examined before, the wife was called to contradict his evidence, and thus to prove him guilty of perjury. The other ground was this; that her evidence would have a tendency to charge him with bigamy, or might lead to a charge for that crime, and cause the husband to be apprehended. I am not sure that the import of the expression, "tendency to criminate," was very accurately defined in that case. It was, probably, not understood as meaning that the wife's evidence could be used against her husband, for we know that this could not be so. It has, indeed, been argued that the wife's evidence in this case might operate as a direct charge against her husband, by analogy to what has been said may be practised in a civil action, where, if the issue be upon a felony, and the felony proved, the party against whom it has been proved may be apprehended upon that evidence; but supposing that to be so, the present is not an analogous case, and nothing which the wife proved on this occasion could be the direct means of founding a prosecution against her husband, although it might afford the means of procuring evidence against him. But such a collateral consequence is not a sufficient objection. With

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respect to the case of *Broughton v. Harpur*, the ground on which the chief justice rejected the witness does not appear very clearly upon the report; the objection to her testimony seems to have been put on the ground of interest. At the period when that was so ruled by the chief justice, the authorities were contradictory as to the nature or degree of interest which rendered a witness incompetent, whether it need amount to an interest in the event of the suit; but in later times this rule has been better established, the courts inclining to let the objection on the score of interest go rather to the credit than the competency. Therefore, on the ground that the admission of this witness does not interfere with the policy of the law, as it concerns marriage, I think she was competent.

ABBOTT, J. I also am of opinion that this witness's testimony was well received, and ought not to have been struck out. The question does not arise here, as to the admissibility of husband or wife to contradict the testimony which has been previously given by the other, and I therefore abstain from saying any thing upon that point. Complaint, indeed, has been made, in the progress of the argument, of the course of proceeding pursued at the sessions by the respondents, in marshalling the evidence, in order to steer clear of *Rex v. Cliviger*; but it is plain that the appellants did not propose to call the husband, and, therefore, could sustain no prejudice on that account. But the opinion which I have now formed would have been the same if a different course had been followed; for instance, suppose the respondents had begun by proving the pauper's maiden settlement, and the appellants had answered that by proving her marriage with Willis, and then the respondents had called the first wife to prove the former marriage, I should have been of opinion that she was competent to make such proof; so that the order of proceeding, in my judgment, made no difference. Her evidence upon this occasion can never be received against her husband, nor can the decision of the sessions be used against him. They can found neither a charge, nor the evidence of any charge, against him. So that it may properly be said of her evidence, that it has not any tendency to criminate him, provided that expression be understood with the limitation which I affix to it, that is, to criminate him in the course of some proceeding, in which a crime is imputed to him. With this qualification, I give my assent to the expression; but if it is to be carried further, with all my respect for the learned judges who decided *Rex v. Cliviger*, I cannot but say that I know not what limitation is to be given it.

Order of sessions confirmed.

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The rule at common law, with its exceptions, that a husband or wife is not a competent witness for or against each other, in a civil or criminal case, has been long established. The reason and policy of this rule was discussed and questioned in a recent case in the Court of Queen's Bench, by Mr. Justice Erle, in the usual clear and forcible manner of that learned judge: "The law relating to the exclusion of evidence on account of interest," he says, "gave effect to the principle of uniting the interest of husband and wife. If the husband was excluded on account of interest, so was also the wife on account of her united interest; and if the capacity of the husband was restored, the wife became thereby also capable. Although the wife had no direct interest during coverture in personal property, she was taken to have an indirect interest, derivative from that of her husband. The party to a suit was both excluded and exempted on account of his interest. For the same reason, and from the same union of interest, the wife of a party was also exempted and excluded. If capacity was restored to the parties by judgment by default, by *nolle prosequi*, or otherwise, the capacity of the wife was also restored thereby. It seems to me to follow, that when the incapacity of parties is taken away by statute, the incapacity of the wives of parties should also cease, and so the union of capacity or incapacity be still maintained. This brings me to the question whether there was any other principle for excluding the wife of a party, besides this union of interest and privilege between husband and wife. Upon the affirmative side, authorities are cited for the exclusion of the wife, with a view to preserving the peace of families. They are collected in 2 Taylor on Evidence, p. 899, where it is said, that the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and that the confidence subsisting between husband and wife should be sacredly cherished. There is no doubt that the law most carefully protects the interests connected with marriage, and that it established the union of interest above mentioned for the purpose

of domestic union, and excluded the testimony of the wife where the husband was excluded on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application; but if they are carried beyond this limit, and are supposed to introduce the tendency to domestic discord as a ground of exclusion, they will be found to be contrary to the known principles of evidence, and to be incapable of being consistently applied. For if this ground of exclusion existed, it would apply to other witnesses as well as to parties, their domestic peace being equally important. But it is clear, with respect to witnesses not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension as freely as if the marriage was null. Even if it could be supposed that the law regarded only the domestic peace of parties and protected their confidence, still the supposed ground of exclusion is not consistently applied; for if a husband is assaulted or libelled, he may seek redress either by action or indictment. In either form, he is in substance the party. If he proceeds by action, he and his wife were incompetent. If by indictment, both are admissible, either to corroborate or contradict or discredit each other. Now, if the principle of excluding the wives of parties was the protection of domestic peace and confidence, the wife ought to be excluded equally in both cases; but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil court to be neglected in the criminal court. With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times, but no such principle has been brought into practice. The decisions excluding the wives of parties have been

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accompanied with general declarations in favor of such protection. But as the exclusion extended to all the testimony of the wives of parties, whether it was confidential or not, and as no protection was given to conjugal confidence, in respect of the wives of witnesses not parties, who are as much within the reason of the rule, if it existed, as the first-mentioned class, I think the rule has not yet been established.

"As to the authorities, most of the decisions in favor of the exclusion of the wives of parties were given in cases where the husband was excluded, and so are consistent with the principle of union of admissibility. In *Bentley v. Cook*, 3 Douglas, 422, the wife was plaintiff, and so the husband was excluded. In *Davis v. Dinwoody*, 4 Term Rep. 678, the wife's trustees were plaintiffs on her behalf, and the husband was excluded. And thus, in *Hawkesworth v. Showler*, 12 Meeson & Welsby, 45; 13 Law Journal Rep. (N. S.) Exch. 86, the wife of Boyce was excluded from giving evidence for Showler, because she was the wife of a party to the issue under trial, who was incapacitated either for or against himself, and the same incapacity extended to the wife. The decisions excluding the wife where the husband was not excluded, upon some general purposes of promoting conjugal peace, appear untenable. In *Broughton v. Harpur*, 2 Lord Raymond, 752, the question in ejectment was, whether the plaintiff was son and heir of Hannah Jacques, and the first wife of Jerome Jacques was called by the defendant, to prove that his supposed marriage with Hannah was null, because she had been previously married, and was still alive. She was rejected, on the ground, as mentioned in the report, that she swore to her advantage to get a husband, but on the ground, as mentioned in some later cases, that she would criminate her husband of bigamy, and in others, that she would occasion dissension with her husband. But her evidence would operate nothing in regaining her husband, nor would it criminate him more than the public offer of it, and dissension was not probable, and according to the

law, as now settled, the witness would be admitted. In *Rex v. Cliviger*, 2 Term Rep. 263, upon a question of the settlement of a woman as a wife, the former wife of the alleged husband was held inadmissible to prove the former marriage and contradict the husband, because it might tend to criminate him of bigamy and perjury. Here, also, the public offer of the evidence had all the tendency that the evidence would have had; and here, also, evidence essential for ascertaining the truth was excluded, lest a tendency should be created which already existed. The principle of exclusion laid down in this decision was received with dissent by the court in *Rex v. All Saints, Worcester*, and in *Rex v. Bathwick*, 2 Barnewall & Adolphus, 639; 9 Law Journal Rep. (M. C.) 103; and in these cases the exclusion of the wife was said to be confined to cases where the husband was a party. They, therefore, in effect deny any direct ground of exclusion on account of domestic peace as applicable to all witnesses. In *O'Connor v. Majoribanks*, 4 Manning & Granger, 435, the widow was held incompetent to prove the authority of her deceased husband to pledge some property for a loan, on the ground that confidential communications between husband and wife should be protected; and although the communication in question was not confidential, but intended to be divulged, the court thought it necessary to exclude evidence of all communications, to secure the exclusion of those which were confidential. I may be allowed to doubt this necessity, and to inquire whether it is satisfactory to sacrifice the interest of truth, by excluding essential evidence, for the sake of protecting a confidence which never existed. These cases lead me to the conclusion, that, from the union of interest between husband and wife, there was a union of incapacity, and upon a restoration of capacity to the one, the other is also rendered admissible.

"If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information, as a means for finding truth, is absurd. It is not doubted that the wives

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often possess essential information, as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness. If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law; these evils are certain, and if the notion of a compensating good in the promotion of domestic happiness, by rendering the wife powerless as a witness, be analyzed, I believe it will be found illusory. The idea, that husbands generally would suborn their wives to perjury and persecute them if they spoke truth, is to my mind unworthy of the time. There is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses. And if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a means for protecting the peace of his family and the sanctity of his marriage, was better than administering the law according to truth. These observations apply to the present case; for the husband was examined, and did not understand the matters in question, which had been managed by his wife. If she had been excluded, the verdict would have been for the plaintiff, and the defendant would have been made liable to a demand contrary to truth." *Stapleton v. Croft*, 10 Eng. Law & Eq. Rep. 455, 460, (1852.) And see *Barbat v. Allen*, 7 Exchequer Rep. 609; 10 Eng. Law & Eq. Rep. 596.

In *Rex v. Bathwick*, 2 Barnewall & Adolphus, 639, the rule laid down in the principal case was discussed and affirmed. The facts in the two cases were similar. Lord Tenterden, C. J., delivered the judgment of the court: "First, we are of opinion that the witness Mary, assuming her to be the first and lawful wife of W. T. Cook, was a competent witness. The

question arose on the settlement of another woman, considered to be the wife of Cook. Cook was examined, and proved his marriage with this woman; but he was not asked, and did not say, that he had not been previously married to the witness Mary. The witness Mary was afterwards called, to prove her previous marriage with this person. In deposing to this marriage, she did not contradict any thing that he had said. I notice this fact; but we do not mean to say that, if she had been called to contradict what he had sworn, she would not, in a case like this, have been a competent witness to do so. It is not necessary to decide that question at present; but it may well be doubted whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called. In the present case, however, the witness not having been called to contradict her husband, and her testimony not being inconsistent with the fact to which he had deposed, her incompetence, if it can be established, can be so only upon the authority of the case of *Rex v. Cliviger*, 2 Term Rep. 263. The authority of that case was much shaken by the decision of the case in *Rex v. All Saints, Worcester*, in which Lord Ellenborough said — (The learned judge here quoted from the opinion of Lord Ellenborough, in the text, the passage included in the asterisks, * * ante, p. 247, and proceeded): The decision in the case of *Rex v. Cliviger* appears to have been founded on a supposed legal maxim of policy, namely, that a wife cannot be a witness to give testimony, in any degree, to criminate her husband. This will undoubtedly be true in the case of a direct charge and proceeding against him for any offence; but in such a case she cannot be a witness to prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true, that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any

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decision of the Court of Session, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether *res inter alios acta*; neither the husband nor the wife has any interest in the decision of the question; and the interest of the parish of Pancras required that the illegality of the second marriage should be established if it was in fact illegal."

In 2 Russell on Crimes, (3d ed.) 933, the case of *Rex v. Glead*, Gloucester Lent Assizes, 1832, is reported from the MSS. of Mr. Greaves, and is here copied, although it is very doubtful if it be law. On an indictment for stealing wheat, Eliza Ellis was called on the part of the crown, to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband, by causing a charge to be made against him. *Rex v. All Saints, Worcester*, and *Rex v. Bathwick*, were cited. Taunton, J.: "I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale.¹ In *Rex v. All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately." Having consulted Littledale, J., the learned judge added: "We both agree in opinion, that the witness is incompetent. We think *Rex v. All Saints, Worcester*, very distinguishable. There, at the time when the wife was examined, there was nothing in her evidence to criminate her husband. Here, the evidence would directly charge the husband with being a principal; and although there is no prosecution pending, her evidence cannot but facilitate an accu-

sation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received."

In *The State v. Gardiner*, 1 Root, 485, (1793,) which was an information charging the defendant with having committed adultery with Anna Clark, the wife of Samuel Clark, the prosecution offered the husband to prove the fact. By the Court: "He cannot be admitted. In a prosecution against the wife, clearly he could not be a witness, and in testifying to the criminality of the prisoner, he must necessarily testify to the criminality of his wife; further, he may be interested in laying a foundation, by his testimony, for a divorce." It is to be observed, that this information charged the defendant alone, and not jointly with the wife.

In *The State v. Welch*, 26 Maine, 30, (1846,) on a state of facts precisely like those in *The State v. Gardiner*, a like decision was made. Tenney, J., in delivering the opinion of the court, said: "If there is soundness in the reason which is given in the books, for holding incompetent the husband or the wife to give, against each other, evidence, because it may be the 'means of implacable discord and dissension between them,' it is certainly difficult to perceive how that discord and dissension will fail to arise, when, in collateral proceedings, testimony should be given by one which charges directly upon the other the same crime for the commission of which the party on trial is indicted. On principle and authority, we think the witness incompetent."

It is by no means clear, "on principle and authority," that the witness was competent. If the prevention of "implacable discord and dissension" is the basis on which this principle is founded, it vanishes when the wife, by her own act, has forever destroyed, to quote the language of the learned judge, "the security and con-

¹ I am not aware of the passage referred to by the learned judge, but see 2 Hale, P. C. 279, and 1 Hale, P. C. 301, cited in the argument, and referred to by Lord Ellenborough, C. J., in the principal case.

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fidence of private life." Says Chief Justice Mellen, in another case: "So far as the general incompetency of the wife is founded on the idea that her testimony, if received, would tend to destroy domestic peace, and introduce discord, animosity, and confusion, in its place, the principle loses its influence when that peace has already become wearisome to a passionate, despotic, and perhaps intoxicated husband, who has done all in his power to render the wife unhappy, and destroy all mutual affection." *The State v. Soule*, 5 Greenleaf, 408.

It is equally clear, on authority, that this decision cannot be sustained. Mr. Justice Tenney, in his opinion, correctly states the principle on which *Rex v. All Saints, Worcester*, was decided; and it is evident that he fails to bring the case at bar within that principle.

But although, in these cases, the wife will be permitted to testify against her husband, it by no means follows that she will be compelled to do so; and, from the judgment of Mr. Justice Bayley, in the text, it seems that the better opinion is, that she may throw herself upon the protection of the court, and decline to answer any question which would tend to expose her husband to a criminal charge. 2 Taylor on Ev. § 997.

Whether, in collateral proceedings between third parties, says Mr. Taylor, a husband and wife would be permitted to contradict each other, has not in England been expressly decided; but the leaning of the courts is evidently in favor of their admissibility for such a purpose. See per Lord Ellenborough, in the text; *Rex v. Bathwick*, per Lord Tenterden, ante, p. 252; *Annesley v. Earl of Anglesea*, 17 Howell's State Trials, 1276. Indeed, if this were not the law, great injustice might be done; since the competency of the witness would then depend on the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance of his wife having been previously called on the part of the plaintiff, though, had the defendant been entitled to begin, the husband would have been examined,

and the wife rejected. 2 Taylor on Ev. § 998. In Ireland, it has been held by all the judges, that it is no objection to the evidence of a wife, that she is brought to contradict the testimony of her husband, even where he is the prosecutor of an indictment. *Rex v. Houlton*, Jebb, C. C. 24.

The subject of the competency of a wife to give evidence against her husband, was much considered in the reign of Charles I. The judges determined that Lord Audley's wife might give evidence against him, for having aided one of his servants in committing a rape upon herself. The judges held, that where a wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness; and a curious reason assigned is, that in such a case a villain may be a witness against his lord. 3 Howell's State Trials, 402, 413; Hutton, 115, 116. So on the trial of an indictment for an assault and battery upon her, *Rex v. Azine*, 1 Strange, 633, by Lord Raymond, on the authority of *Lord Audley's case*; *The State v. Soule*, 5 Greenleaf, 407; or, for maliciously shooting, *Whitehouse's case*, 2 Russell, Crim. Law, (3d ed.) 984; or, attempting to poison her, *Rex v. Jagger*, 2 Ibid. 984, she is a competent witness. And it is now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other. 1 East, P. C. 454. But though a competent witness, it is not indispensable that such party should be called. *Regina v. Pearce*, 9 Carrington & Payne, 667. And Mr. Justice Holroyd seems to have thought that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness. *Whitehouse's case*, 2 Russell, Crim. Law, (3d ed.) 984. And in *The State v. Davis*, 3 Brevard, 3, the wife was admitted as a witness against her husband, on the trial of an indictment for an assault and battery upon her, on the ground that no other person was present when the offence was committed. But the language of the court does not restrict the rule within so narrow bounds.

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The prosecution of the Wakefields, for conspiracy and the abduction of Miss Turner, says Mr. Townsend, in the Preface to *Modern State Trials*, forms a singular chapter in legal history; interesting not less to the student of human nature, on account of its characters and incidents, than to the lawyer, for those elaborate discussions on the Scottish law of marriage, and the right of the wife, even should there have been a legal marriage, to appear as a witness against the offending husband, which were argued with such profuse learning and ability. But three or four cases occur, says the same elegant writer, Vol. II. *Modern State Trials*, p. 116, at long intervals of time, in the various collections of trials, at all resembling it. In the first one, Lucy Ramsay was inveigled into a coach in Hyde Park. Browne who had employed the persons in the park that spirited her away, afterwards prevailed upon her to marry him, on the threat that, if she refused, he would convey her secretly to France. 1 Ventris, 243. In the second case, one Pleasant Rawlins, an heiress, was arrested on a pretended debt, at the instigation of a German adventurer, Swendsen. He had been her suitor, without much chance of success, and hastened to her, when in custody of the sheriff's officers, to take advantage of the time and place. On his assurance, that the only thing to prevent her being taken to Newgate was to marry him instantly, she consented. The marriage immediately took place, one of the Fleet parsons, those pests of society, being at hand to perform the ceremony. Notwithstanding their marriages under constraint, the two ladies were examined; and, upon their testimony chiefly, both Browne and Swendsen were convicted, and afterwards executed, the consent being held nugatory, as it had been induced by fear and fraud. 5 State Trials, 450. In the third case, *Rex v. Perry*, tried before Sir Vicary Gibbs, then recorder of Bristol, the lady obtained a triumphant acquittal for the supposed conspirator. She entered the witness-box fearlessly, and deposed that the defendant had used no other arts than what a lover ought,

and that she had eloped with him of her own free will, and with her entire consent.

The termination of the trial was equally abrupt in a fourth case, the King, on the prosecution of Mrs. Fanny Lee, against Lockhart and Loudon Gordon, tried at Oxford, in 1804, before Mr. J. Lawrence, for a forcible abduction, but very different, in some of its circumstances, from the present, for there the conduct of the lady gave an appearance of connivance. Though carried with seeming violence out of her own house, she was a married lady, living apart from her husband. She rode cheerily in the different post-chaises, flung a camphor bag, which she had carried as a charm, out of the window, and, supping at Petsworth with the two gentlemen, conversed, according to her own evidence, about hieroglyphics and Grecian architecture. The judge stopped the case, as there was a total absence of proof of force in the county in which the trial took place.

In *Wakefields' case*, 2 Lewin, C. C. 1, 279, the defendants had, by fraudulent means, obtained possession of Miss Ellen Turner, and carried her off to Gretna Green, where, by false representations, she was persuaded to go through the ceremony of a Scotch marriage, and become the wife of Edward Gibbon Wakefield. On the trial, the counsel for the prosecution proposed to call Miss Turner as a witness. Before she was sworn, Mr. Scarlett rose to object to her evidence: "Mr. Scarlett.—My lord, I propose to show that this witness is incompetent. My lord, the threat of my learned friend certainly will not deter me from doing what I conceive to be my duty in point of law, when I am called upon to do it. If he thinks it necessary for his case to examine this young lady, of course I must conceive his object in examining her is to affect the criminal party. And therefore I propose to show to your lordship she is legally married to Mr. Wakefield. I can do that by giving evidence of the marriage, and other circumstances to show it was a legal marriage; and therefore I apprehend she cannot be examined as a witness. I appre-

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hend I have a right to do that, without examining her on the *voir dire*.

Mr. Baron Hullock. I don't know that, Mr. Attorney. Supposing the marriage should turn out to be an invalid marriage, that fact must be acquired through the medium of her evidence. But if the marriage should be considered a good marriage, that is, should be proved to be a good marriage according to the law of that country in which it was performed, then another question will arise, whether, even if she be the legal wife of this gentleman, she may not still, by the law of this country, be a competent witness.

Mr. Scarlett argued the case as if the rules of law were that a wife could, in no event, be admitted as a witness against her husband, save only for the purpose of proving force or some criminal charge. The wife's testimony had never been received under the statutes, except where force had been used. This principle was laid down too broadly, for in the case of *Rez v. Perry*, Bristol, 1794, cited by the judge, no force had been used, quite the contrary; and the husband was acquitted on the evidence of the wife. The Attorney-General insisted that he was in a condition to prove that Miss Turner gave her full and free consent to the marriage; that a marriage did take place in Scotland, which, by the law of Scotland, was a valid marriage; that he had the option of proving *aliunde*, by collateral testimony, the incompetency of Miss Turner as a witness against Mr. Wakefield, without examining her at all. Mr. Brougham stoutly protested against his learned friend twisting in the best part of the defence under the color of giving evidence on this collateral issue; and as it was a matter of practice entirely depending on the discretion of the presiding judge, he decided on requesting Miss Turner to be called. He expressed a strong opinion that the objection would come to nothing.

Baron Hullock pronounced his opinion in favor of the admissibility of Miss Turner's evidence. "Even if the lawful wife of the defendant Gibbon Wakefield, she is a competent witness against her husband, in respect of any charge which

affects her liberty or her person. She may file articles of the peace against her husband. She may prosecute him for a misdemeanor, as was done in the case of Jagger, at York, before Mr. Justice Lawrence, which was the case of an attempt by the husband to poison his wife. It was done in the case of Lady Strathmore against Mr. Bowes and others; and in various other cases that have occurred since that time. I think it would be a strange incongruity in the law of the country, with respect to the practice of the admissibility of evidence, if it was to shut out the evidence of the only individual who was competent to speak to the facts of the case. It should seem that she is a witness *ex necessitate*, because if she was not a witness, injuries might be committed with impunity; the law of the land might, in fact, be violated with the greatest possible ease with impunity; the husband would be allowed to commit the grossest acts of violence without punishment, if the wife was not allowed to be a witness to prove them. And, therefore, if the marriage be wrong, she is admissible; and if it be right, I think still, in point of law, she is, under all the circumstances of this case, a competent witness."

In Ireland, on an indictment for the fraudulent abduction of an heiress, under eighteen years of age, the lady was admitted as a witness for the prosecution. *Regina v. Yore*, 1 Jebb & Symes, 563: "As to the effect upon her competency," said Bushe, C. J., "produced by the marriage, it is unnecessary to discuss it at length, as the case was decided in *Wakefield's case*. Baron Hullock ruled a similar objection in that case, by admitting the prosecutrix, Miss Turner, as a witness. That case came afterwards into the King's Bench, (1 Deacon, Crim. Law, 4,) upon a motion in arrest of judgment on another point, and no question was raised as to the propriety of Baron Hullock's decision; and shortly afterwards Miss Turner was examined as a witness in support of the bill for a divorce, although that bill was opposed by Wakefield."

But in a very recent case, in New York, it was said: "The American au-

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thorities do not countenance *Wakefields' case* nor *Perry's case*. *The People v. Carpenter*, 9 Barbour, 580. In commenting on *Wakefields' case*, Barculo, J., said: "But the counsel for the people contend for a much broader exception; one that will embrace all cases of secret injuries. To support this doctrine, they rely, in part at least, upon the case of *Rez v. Wakefield*, (cited 2 Russell on Crimes, 606,) where, on an indictment for a conspiracy in unlawfully taking Ellen Turner and procuring her to be married, Hullock, B., received the evidence of the wife, as being admissible on the ground of necessity, even supposing that the marriage was valid. This ruling was at the Lancaster Assizes, in 1827, and can hardly be deemed an authority for introducing a new rule. That the evidence was properly received, upon the ground that the marriage itself was illegal and invalid, is highly probable; but that the *reason assigned* for its reception is a sound one, is by no means true. For if the marriage were valid, there could not be any reason of necessity for the wife to be a witness against her husband. If neither force nor fraud were used, then no such personal injury was done to her as could warrant the wife's appearing as a witness for her own protection. If *either were used*, then it was at least doubtful whether she *was a wife*, and Wakefield could not be permitted to take advantage of his own wrong, by setting up his own violent or fraudulent act as the ground for excluding the principal witness, under pretence that she had thus become his lawful wife. The same remarks are applicable to the case of *Rez v. Perry*, cited by the learned judge."

In *Perry's case*, Gibbs, C. J., said that he could see no distinction between admitting a wife for and against her husband. "*Rez v. Perry*," said Abbott, C. J., in *Rez v. Serjeant*, Ryan & Moody, N. P. C. 354, "was much talked about at the time, and Chief Justice Gibbs expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband, when admissible against

him." Accordingly, it has been held in Alabama, that on an indictment against him for an assault and battery upon her, she is a competent witness for him, to disprove the charge. *The State v. Neil*, 6 Alabama, 685.

Finally, it is to be observed that this rule of exclusion extends only to lawful marriages. On a trial for forgery, Lord Kenyon refused to admit a woman as a witness for the prisoner, whom, in the course of the trial, he had frequently alluded to as his wife, but afterwards, on hearing an objection taken to her competency, denied that they were in fact married. *Anonymous*, cited by Richards, B., in 1 Price, 83. It should be observed, that in this case the criminal had, throughout the trial, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned. And in a subsequent case, *Batthews v. Galindo*, 4 Bingham, 610; 1 Moore & Payne, 565; 3 Carrington & Payne, 238, where Lord Kenyon's ruling was discussed, Park and Burroughs, J. J., declared that his lordship's decision was founded on this admission, and the whole court determined that a kept mistress is a competent witness for her protector, though she passed by his name, and appeared to the world as his wife. And see acc. *Regina v. Young*, 2 Cox, C. C. 291. So where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation. *Wells v. Fletcher*, 5 Carrington & Payne, 12; s. c. nom. *Wells v. Fisher*, 1 Moody & Robinson, 99, and note. And it seems that a supposed husband or wife may, both in civil and criminal cases, be examined on the *voir dire* to facts showing the invalidity of the marriage; and it is apprehended no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been

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previously proved by independent testimony. 2 Taylor on Ev. § 994; *Regina v. Peat*, 2 Lewin, C. C. 228; *Wakefield's case*, ubi supra; *Rex v. Bramley*, 6 Term v. *Young*, 5 Cox, C. C. 296. See *Regina* Rep. 330. H.

 KEIR v. LEEMAN.¹

Trinity Vacation, 1844.

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The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff, and riot, and of an action for wrongful levy under a *fi. fa.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the *fi. fa.*, is altogether invalid, as grounded on an illegal consideration.

Although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial.

ASSUMPSIT. In this case the Court of Queen's Bench gave judgment for the defendants, upon which judgment the plaintiff brought error, in the Exchequer Chamber. The pleadings are here omitted, because a full abstract of them is there given. See post, p. 263, *et seq.*

Lord DENMAN, C. J., in this vacation, (June 27,) delivered the judgment of the court. His lordship, after stating the substance of the declaration, proceeded as follows:

The plea set out the indictment, and averred the illegality of such an agreement. The plaintiff demurred; and the general doctrine was largely discussed before us.

The principle of law is laid down by Wilmut, C. J., in *Collins v. Blantern*, 2 Wils. 341, 349, (see 1 Smith's Lead. C. 154,) that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on an unlawful consideration and void.

On the soundness of this decision, no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extor-

¹ 6 Queen's Bench Rep. 308.

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tion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe.

An early case occurs before Lord Talbot, *Johnson v. Ogilby*, 3 P. Wms. 277. A bill was filed to compel performance of an agreement to pay money and assign property in consideration, among other things, of dropping an indictment for a cheat of a peculiar character. A female, who had agreed to levy a fine and suffer a recovery of some houses to the use of plaintiff, afterwards pretended that she was married at the time of the agreement, and pleaded her marriage to the bill. The plaintiff then indicted her for a cheat; and, when the indictment was ready for trial, the parties entered into this compromise. The principal question argued was whether the attorney's signature bound him personally. But the reporter says: "Then the lord chancellor started another point, namely, that this was a criminal prosecution; and the agreement being to stifle a criminal prosecution, was therefore not to be executed in equity. • To which I answered," (says Mr. Williams,) "that it was true, in the case of a prosecution for felony, an agreement to stifle such a prosecution was not lawful; but where the indictment was for a fraud, and the party wronged by the fraud came to an agreement to be satisfied for such injury, (as in conscience he ought to be,) this was lawful, matters of fraud being cognizable and relievable as well in equity as at law; wherefore this objection was no further insisted on."

This reason is not, perhaps, very satisfactory; nor did this point apparently receive much consideration. It occurred in 1734; *Collins v. Blantern*, 2 Wils. 341, in 1767.

The doctrine was several times discussed before Lord Kenyon.

In Mr. Kyd's Treatise on Awards, two of his decisions are reported. In 1795, an indictment against Lord Falkland, John King, and another, (*Rex v. Lord Falkland*, Kyd on Awards, 66, 2d ed.; cited in Watson on Awards, 48, note (1), 2d ed.,) for a conspiracy to cheat Mr. Phillips by a false representation of the ownership of certain estates on which he advanced money, and also indictments for perjury, were called on for trial at nisi prius; the defendants were acquitted on the first, and (it should appear) not on the merits; after which an order was made at nisi prius for referring to arbitration all the matters in difference between the prosecutor and the defendants in the said indictments. This was done with the acquiescence of Lord Kenyon. Mr. Kyd remarks on this proceeding as inconsistent with what the same judge had done in *Rex v. Coombs*, 7 T. R. 475, and *Rex v. Rant*, Kyd on Awards, 64, (2d ed.,) where cross bills of indictment for riot and assault had been preferred and submitted to arbitration; in which case the counsel "had hardly stated the fact of the submission by bond, when the court expressed a consider-

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able degree of surprise that a criminal prosecution should be so submitted; they observed that it was usual indeed in prosecutions of this kind, before a verdict was given, or after verdict of conviction, and before sentence, for the parties to talk together by the recommendation of the court, and if they agreed, the court set a nominal fine; but the whole was done under the inspection of the court, and *their* sentence formally followed."

In *Fallowes v. Taylor*, 7 T. R. 475, the magistrates had directed prosecutions for a public nuisance in a river; the plaintiff by their order had prepared bills of indictment against the defendant, who, in order to avoid the expense of the indictment, entered into the bond on which the action was brought, to remove the nuisance. Lord Kenyon, C. J., and Lawrence, J., clearly held this to be a lawful consideration for the bond.

In *Drage v. Ibberson*, 2 Esp. 643, Lord Kenyon said "that he should adhere to the class of cases which held, that the consideration being the settling of a misdemeanor, might be good in law," and nonsuited the plaintiff, who had brought trover for a promissory note given by himself to compromise a charge. The facts of the case are not very intelligible; but the caution with which that learned judge expressed himself is worthy of observation.

In *Poole v. Bousfield*, 1 Camp. 55, (1807,) an agreement had been executed between the plaintiff and defendant to discharge the latter from liability on a bill of exchange, as an inducement not to move the court for the defendant to answer the matters of an affidavit. Lord Ellenborough held that the agreement was corrupt and invalid, and the plaintiff was entitled to recover that amount.

The case of *Edgcombe v. Rodd*, 5 East, 294, (1804,) was very singular in its circumstances. The plaintiff had been charged before justices with a misdemeanor; that of disturbing the religious worship of a dissenting congregation. He sued them for false imprisonment; and they pleaded by way of defence that they had discharged him from the imprisonment, and that the prosecutor had agreed to proceed no further, in satisfaction of that same imprisonment. On argument this defence was properly held naught; and each of the judges declares his opinion that the agreement itself was unlawful, as an obstruction to public justice. Le Blanc, J., observes: this "was a prosecution for a public misdemeanor, and not for any private injury to the prosecutor."

Beeley v. Wingfield, 11 East, 46, was an action on a promissory note for £24 given by a defendant to a parish officer, on whose prosecution he had been convicted at Quarter Sessions of beating his apprentice. The plaintiff had been bound over to prosecute; and the court considered this security in abatement of the period of defendant's

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imprisonment for the misdemeanor. The judgment of Lord Ellenborough, C. J., is as follows: "There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expenses incurred by them in bringing the defendant to justice. It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears."

I happened to be both at quarter sessions when this note was given, and at the assizes where the case was tried; and I always felt some doubt whether the proceeding thereby sanctioned was quite correct; the principle, however, on which compromise of offences may be lawful, is forcibly laid down with proper limitations. *Kirk v. Strickwood*, 4 B. & Ad. 421, is to the same effect.

In *Baker v. Townsend*, 7 Taunt. 422, the Court of Common Pleas held that, after conviction on an indictment for assault committed in relation to claim of right to land, when the defendant was brought up for judgment, the assaults, the costs of the indictment, and the disputed right of possession, and all matters in dispute, might lawfully be referred to arbitration. Gibbs, C. J., thus expressed himself: "The parties have referred nothing but what they had a right to refer. They have referred the several assaults; these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred."

The last case to be cited is *Elworthy v. Bird*, 2 Sim. & Stu. 372. Sir J. Leach there enforced an agreement for a separation of man and wife under the circumstances, though it embraced also a compromise of indictment for assault. The doctrine was fully discussed; and the Vice-Chancellor concisely remarks that "all the authorities concur that the policy of the law does permit the compromise of indictments for assault, and such compromises are frequently recommended and approved by the court."

The result of the cases makes it clear that some indictments for misdemeanor may be compromised, and equally so that some cannot. The line will, as we apprehend, be found correctly traced by Gibbs, C. J., in the passage just quoted, and by Le Blanc, J., in *Edgcombe v. Rodd*, 5 East, 294.

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We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

In the present instance, the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise.

The approbation of the judge (whether necessary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly it cannot make that legal which the law condemns. But, according to this record, the obtaining it was not made a condition of the promise, nor was it in fact obtained till after the agreement made.

So much was said in argument for the purpose of raising a doubt whether the plaintiff was prosecutor of the indictment, and had bound himself to any thing inconsistent with his public duty in withdrawing the prosecution, and forbearing to adduce evidence in support of the indictment, that we ought not to pass it over entirely. The language of the declaration and of the plea, however, requires only to be read, to show that there is no real doubt on the point.

We think the agreement invalid as founded on an illegal consideration, and that the defendants are entitled to judgment.

Judgment for Defendants.

KEIR v. LEEMAN.¹

Trinity Vacation, 1846.

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In an action of assumpsit, it appeared that plaintiff had indicted several persons for riot and assault upon a constable in the execution of his duty, and upon others aiding him, and for simple assaults; which offences were alleged to have been committed in impeding the execution of a *fi. fu.* issued by plaintiff against the goods of one of the persons indicted. Defendants, (being third parties,) in consideration that plaintiff would, at their request,

¹ 9 Queen's Bench Rep. 371. In the Exchequer Chamber. Error from the Queen's Bench.

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not further prosecute, promised to pay the balance in the original action remaining unsatisfied; and likewise the costs of the prosecution. Plaintiff, in consideration thereof, with the assent of the judge before whom the prosecution was, at the assizes, forebore to prosecute further.

On demurrer to pleas which set out the indictment, and which, in answer severally to counts charging the different promises, relied upon the illegality of the contract:

Held, by the Court of Exchequer Chamber, affirming the judgment of Queen's Bench,

That the consideration was unlawful, and that no action could be maintained on any of the promises.

ASSUMPSIT. The first count of the declaration stated that, before the making the promise, &c., plaintiff recovered in the Queen's Bench a judgment against George Emmitt, and sued out a *fi. fa.*, which was indorsed, &c., and delivered, &c.; that the sheriff made his warrant thereon, which was delivered to one George Acton, to be executed, &c.; who thereupon, by virtue, &c., entered on a farm, and a messuage and dwelling-house of G. Emmitt, and seized goods and chattels of G. Emmitt, as and for goods and chattels of G. Emmitt, in the said messuage, &c., and divers crops and effects, to wit of G. Emmitt, as and for the crops of G. Emmitt, on the farm; and, Acton being in possession, one William Emmitt, claiming the farm, messuage, dwelling-house, goods and chattels, crops and effects, as his own property, had, with other persons, to wit the said G. Emmitt, W. Ward, J. Atkinson, D. Hodgson, G. Atkinson, and J. Cromack, assaulted Acton, and others his followers and assistants, and forcibly and violently ejected and expelled them from the messuage and dwelling-house, and from the possession of divers of the goods and chattels, and kept the same in the dwelling-house, and, by shutting the outer door, excluded Acton from the dwelling-house and from the possession, &c., till Acton, in order to retake possession, had necessarily and unavoidably a little broken the outer door, and thereby had reëntered and taken the goods, &c.: That W. Emmitt commenced an action of trespass in the Queen's Bench against the sheriff and Acton, for the entry and seizing. The declaration then set out the pleadings and issues joined in the action, involving, among other things, the title to the messuage, dwelling-house, goods and chattels: That the issues came on to be tried at the Yorkshire Summer Assizes, 1842, when W. Emmitt set up an assignment by G. Emmitt to trustees, and by the trustees to him, W. Emmitt, which assignment the sheriff and Acton insisted upon was fraudulent and void: That a verdict was found for W. Emmitt on an issue of Not Guilty, and for the sheriff and Acton on all the other issues: That the plaintiff had indicted W. Emmitt, G. Emmitt, Ward, J. Atkinson, Hodgson, G. Atkinson and Cromack, "for riotously assembling to disturb the peace, and for assaulting the said G. Acton, and others his followers and assistants, to wit, on the occasion of his, the

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said G. Acton's, entering the said messuage and dwelling-house, and seizing the said goods and chattels," in execution of the writ and warrant: That the indictment had been found at the Yorkshire Lent Assizes, 1842, and stood for trial at the Yorkshire Summer Assizes, 1842; and plaintiff, after the verdict in the cause between W. Emmitt and the sheriff and Acton, and before and at the time of the making the promise by the now defendants, after next stated, was "about to proceed further on such indictment," "and to try the same, and to adduce and offer evidence in support thereof:" That, before and at the time of making the promise, &c., the sheriff, and Acton, his bailiff, were and had been, and continued, in possession of the crops, &c., seized by virtue of the execution, &c.; and, subject to the execution and possession thereby, W. Emmitt was and had been and continued in possession of the same; and divers costs and charges had been incurred in the seizing and remaining in possession, &c., and a large balance of the costs and charges, and of the principal money, damages and costs recovered against G. Emmitt, remained unsatisfied: That the action by W. Emmitt against the sheriff and Acton had been defended in the name of the sheriff and Acton, but under the indemnity and on the retainer and at the costs and expenses of the now plaintiff, and divers costs and charges were due to the attorney about the defence of the suit: That the prosecution and indictment had been preferred and conducted on the retainer, and at the costs and expenses, of the now plaintiff, and divers costs and expenses were due to the attorney; of all which several premises defendants had notice: And thereupon afterwards, to wit 1st September, 1842, "in consideration that the prosecutor, to wit the said prosecutor, the now plaintiff, of the indictment, to wit the said indictment against the said G. Emmitt and others, to wit, &c.," (naming them,) "would, to wit at the request of the defendants, not proceed further in such indictment, and of the sheriff of Yorkshire" (to wit the said, &c.) "withdrawing, to wit by and with the consent and direction of the now plaintiff, at the request of the now defendants, from the possession, to wit the said possession of the crops and effects, to wit," &c., "that is to say, the said crops and effects so claimed by the said W. Emmitt to be the crops and effects of, and to be so assigned to, the said W. Emmitt as aforesaid, and so in his possession, subject to the said execution as aforesaid, at the farm, to wit," &c., "under the execution, to wit the said execution," &c., "the now defendants undertook and promised the now plaintiff to pay him, on or before the last day of Michaelmas term next thereafter, the balance, to wit the said balance of the principal money and costs then remaining unsatisfied, to wit the said principal money, damages and costs so recovered by the now plaintiff against

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the said G. Emmitt as aforesaid, and which then so remained unsatisfied as aforesaid in the original cause, to wit, *Keir against Emmitt,* &c. (identifying the parties,) "and the balance of costs and charges incurred in and about the execution, to wit the said balance of the said costs and charges incurred in and about the said execution of the warrant of *feri facias*, to wit," (identifying): Averment "that, confiding in the said promise of the defendants, the prosecutor of the said indictment, to wit the now plaintiff, against G. Emmitt and others, to wit," &c., "for riot and assault, to wit the said riot and assault, did not proceed further on such indictment; and that afterwards, to wit on" &c., "at the said Summer Assizes and sessions of oyer," &c., "then holden for the county of York, at" &c., "before Thomas Lord Denman," &c., "and Sir William Henry Maule," &c., "the said prosecutor of the said indictment, to wit the now plaintiff, did, by and with the assent of the said George Acton, and his said followers and assistants, so being the person so assaulted as aforesaid, instruct counsel to inform, and by such counsel did inform, the said justices so assigned as aforesaid, in open court, at the said assizes and sessions, of and concerning the premises, and did then and there, by and with the assent and leave of the said court, thereupon forbear to proceed further, and to offer any evidence, upon the said indictment; and thereupon the said persons so indicted, to wit the said G. Emmitt," &c., "were, in due form of law, by a jury of the said county, acquitted of the premises in the said indictment charged upon them;" of which the said defendants afterwards had notice: Averment, that plaintiff, confiding in the said promise, &c., did forthwith afterwards, to wit on &c., withdraw the said execution, to wit, &c., and give notice and directions to the sheriff of Yorkshire, and to the said Acton, his bailiff, to withdraw, and the sheriff and his said bailiff immediately did then withdraw, from the possession of the said crops and effects; of which defendants afterwards had notice. Averment, that the balance of the principal money, damages and costs, at the time of the promise by the defendants remaining unsatisfied, amounted to a large &c., to wit £84 12s.; and the balance of the costs and charges incurred in the execution, at the time of the promise remaining unsatisfied, to a large &c., to wit £63 11s. 11d.; of which defendants afterwards had notice; and, although the last day of the said Michaelmas Term hath elapsed, and G. Emmitt did not, before the said last day &c. or since, pay either of the balances, whereof defendants afterwards had notice, and were requested to pay, yet defendants have disregarded their said promise, and have not paid either sum.

Plea. That the indictment in the first count mentioned was to the tenor &c. The plea then set out the indictment, of which the first

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count charged that the parties indicted, "with force and arms," "unlawfully, riotously and routously did assemble and gather together, to disturb the peace" of the Queen; "and, being so then and there assembled" &c., "in and upon one Robert Ellison, in the peace" &c., "being, unlawfully, riotously and routously did make an assault, and the said R. Ellison, then and there, unlawfully, riotously and routously did beat, wound and ill treat, so that his life was greatly despaired of; and other wrongs to the said R. Ellison, then and there, unlawfully, riotously and routously did, to the great disturbance and terror of the liege" &c.; in contempt &c., to the evil example &c., and against the peace &c. The second count charged a riotous &c. assemblage with force and arms, to wit with sticks, staves, and other offensive weapons, to disturb the peace &c., and that the parties indicted, being so assembled &c., armed as last aforesaid, did unlawfully, riotously, and routously made a great noise, riot and disturbance, and remained and continued armed &c., making such noise &c., for the space of one hour &c., and, being so assembled and gathered, in and upon one George Acton, being an officer of the high sheriff of Yorkshire, then and there being in the due execution of his duty as such officer, did make an assault, and him, so being in the execution &c., did beat, wound and ill treat, with intent to obstruct, resist and molest him in the execution of his duty as such officer, against the form of the statute &c. The third count charged an assault upon, and beating, wounding and ill treating of Acton, then and there acting in aid of a peace officer, to wit in aid of one Robert Chalk, then and there being a constable, and then and there being in the due execution of his duty as such constable, with intent to resist and prevent the lawful apprehension of the parties charged for a certain offence for which they were liable to be apprehended by Chalk and Acton, that is to say, for having unlawfully, riotously, and tumultuously assembled and gathered together to disturb the peace, and assaulted and beaten Ellison and Acton; against the form of the statute &c. The fourth count charged a riotous assembly, and an assaulting, beating and wounding of Chalk. The fifth count charged that the parties assembled with sticks &c., as in the second count, but without stating any assault. The sixth count charged an assault upon, and beating, wounding, and ill treating of Chalk, being a peace officer, to wit a constable, being in the due execution of his duty, against the form of the statute &c. The seventh count charged an assault upon, and beating, wounding, and ill treating of Chalk, not stating his office or duty, with intent to resist the lawful apprehension &c., (as in the third count,) against the form of the statute &c. The eighth count charged a riotous assembling and assault upon George Key. The ninth count resembled the fifth.

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The tenth count charged an assault upon, and beating and wounding of G. Key, acting in aid of a peace officer, to wit, R. Chalk, being a constable in the due execution &c., contrary to the form of the statute &c. The eleventh count charged an assault upon, and beating, wounding and ill treating of G. Key, with intent as in the third count, but not mentioning Ellison; against the form of the statute &c. The twelfth count charged an assault upon, beating, wounding, and ill treating of G. Key, not assigning any special character to him. The thirteenth count charged the same as to R. Chalk. The fourteenth count charged the same as to G. Acton. The fifteenth count charged the same as to R. Ellison. The plea then continued: "And so the defendants say that the said consideration for the said supposed promise in the said first count mentioned was and is illegal, and such supposed promise was and is wholly null and void; and this" &c. Verification.

General demurrer. Joinder.

The second count of the declaration resembled the first, except that the promise was laid to be, to pay to the now plaintiff's attorney the costs, as between attorney and client, of the defendants in the suit of W. Emmitt against the sheriff and Acton.

Plea to the second count, corresponding with that to the first count, *mutatis mutandis*.

General demurrer. Joinder.

The third count of the declaration laid the promise to be to pay to the now plaintiff's attorney the costs, as between attorney and client, of the prosecution; and in other respects corresponded with the first two counts.

Plea as before, *mutatis mutandis*.

General demurrer. Joinder.

In Trinity vacation, 1844, the Court of Queen's Bench gave judgment for the defendants;¹ upon which judgment the plaintiff brought error in the Exchequer Chamber. Joinder in error.

The case was argued in last Easter vacation, Monday, May 11, 1846, before TINDAL, C. J., COLTMAN, MAULE, and CRESSWELL, JJ., and PARKE, ALDERSON, ROLFE, and PLATT, BB. COLTMAN, J., and ALDERSON, B., left the court towards the close of the argument for the defendants.

Bliss, for the plaintiff in error (the plaintiff below). The third count contains only a promise to pay the costs of the prosecution

¹ *Keir v. Leeman*, 6 Q. B. 308; *Ante*, p. 258.

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against G. Emmitt and the rest, as between attorney and client. As this narrows the promise, it will be most convenient to apply the argument to the third count. The consideration for the promise there laid is that the plaintiff, being prosecutor, would not proceed further on the indictment; and the question is whether that be an illegal consideration for such a promise.

It is necessary to keep in view the distinction between felonies and misdemeanors, and, again, the distinction between different kinds of misdemeanor. It may be admitted, for instance, that the abandoning a prosecution for perjury would not be a good consideration for a promise to pay money; that is the doctrine of *Collins v. Blantern*, 2 Wils. 341, 347; see notes to S. C., 1 Smith's Lead. Ca. 154, 168; also *Ward v. Lloyd*, 6 M. & Gr. 785, which it is not necessary to impeach. But the principle will not apply to a prosecution, by a party assaulted, for the assault, unless it be true that all agreements to abstain from the prosecution of misdemeanor of any kind are illegal; and for this no authority can be adduced, except some *dicta* at nisi prius. The court below appears to have acted upon a distinction between an indictment for an assault upon the prosecutor, and an indictment for an assault accompanied by riot, made upon peace officers and their assistants. This distinction is not tenable. The indictment furnishes no criterion of the magnitude of the offence; an assault may be as grievous a crime as a riot. Such a distinction probably would never have been suggested before the statutes which gave a particular character to certain assaults by making them felonious. For instance, it could hardly have been contended that, before stat. 22 & 23 C. 2, ch. 1, § 7, money might not be taken to compromise an indictment for slitting the prosecutor's nose. Whatever distinction exists, can therefore be founded only on the particular facts of the offence. Compounding a felony would be a distinct species of offence; it is so at common law, as theftbote.

[TINDAL, C. J. In felony there is a forfeiture; that would take away the means of paying compensation.]

For felonious acts no action can be brought, unless an action for stolen goods, where the felon has been convicted, be an exception; but many misdemeanors, of which assault is one, may be the subject of either a criminal or a civil proceeding. For these it is reasonable that a compromise should be allowed; and, in fact, it often takes place with the sanction, and, indeed, at the suggestion, both of magistrates and of judges; only nominal damages could be expected in an action after the defendant had been punished upon indictment; and it is not improbable that, if damages were first recovered, the attorney-general would enter a *nolle prosequi* on the indictment; at any rate, the punishment would be trivial. Before stat. 18 Eliz. ch.

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5, an informer upon even a penal statute could compromise the information or suit; he may still do so in the case of proceedings before magistrates. *Rex v. Crisp*, 1 B. & Ald. 282. This statute was not declaratory, but introduced a new principle, as appears from *Williams v. Hedley*, 8 East, 378.

[ALDERSON, B. Can you suggest the limit between misdemeanors which may, and those which may not, be the subject of a compromise? What would you say to an indictment for a nuisance affecting a whole parish? Could that be referred to arbitration?]

It could; and the practice is not uncommon. See *Dobson v. Groves*, and *Regina v. Dobson*, 6 Q. B. 637. The lawfulness of compromising indictments for misdemeanors was recognized in *Johnson v. Ogilby*, 3 P. W. 277, 279, A. D. 1734, a case of prosecution for fraud; in *Drage v. Ibberson*, 2 Esp. N. P. C. 643, (1798,) also a case of prosecution for fraud, where Lord Kenyon adhered to the distinction, suggested in *Johnson v. Ogilby*, 3 P. W. 277, 279, between felony and misdemeanor, though *Collins v. Blantern*, 2 Wils. 341, 347, was cited. In *Rex v. Lord Falkland*, Kyd on Awards, 66, (2d ed.); see Watson on Arbitration, p. 60, note 1, (3d ed.), (1795,) all matters in difference between the prosecutor of some indictments for perjury and the defendants were referred, with the acquiescence of Lord Kenyon. Some doubts have been expressed as to this proceeding, on the ground of its supposed inconsistency with the language of Lord Kenyon himself in *Rex v. Coombs* and *Rex v. Rant*, Kyd on Awards, 64; see Watson on Arbitration, 59, 60; but the only doubt was, whether it was not necessary to obtain the leave of the court before a compromise was made between the parties. That admits the principle; and here the leave of the court appears on the record. Mr. Watson's view (on Arbitration, p. 59,) of the result of all the cases is, "that indictments for assaults, nuisances, &c., may be referred to arbitration, by leave, or by authority of the court where they are depending; but without such permission, or authority, indictments cannot be referred. In *Collins v. Blantern*, 2 Wils. 341, 347, the indictment was for perjury; and it was expressly pleaded that the agreement was unlawful. The agreement was, not to give evidence.

[ALDERSON, B. I do not see how a party could have performed that agreement, if he had been subpoenaed.]

Here the agreement is only not to proceed further; it does not appear that the plaintiff is a witness, or bound over; he may be merely a voluntary prosecutor. In *Fallowes v. Taylor*, 7 T. R. 475, see the judgment of Lawrence, J., (1798,) a party, who had been directed by the magistrates in Quarter Sessions to prosecute for a

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public nuisance, and had prepared (but not preferred) bills accordingly, took a bond to himself for £500, conditioned for the removal of the nuisance; and the court held the consideration legal. That case is the stronger, because the plaintiff had not, as here, a personal ground of action for the thing done. *Edgcombe v. Rodd*, 5 East, 294, (1804,) is relied upon for the defendants. There an action was brought against magistrates for assault and false imprisonment; they pleaded that C. M. had obtained a warrant from them against the plaintiff for a statutable misdemeanor, on which the plaintiff had been committed till the Quarter Sessions; and that afterwards, before the said sessions, it was agreed by C. M. and the plaintiff, with the consent of the defendants, that C. M. should not further prosecute, and should consent to the plaintiff's discharge at the sessions in full satisfaction and discharge of the assault and imprisonment; that this was done, and the plaintiff accepted the non-prosecution and the discharge at sessions in full satisfaction and discharge of the assault and imprisonment. In another (the third) plea, the previous agreement and consent of the defendants were omitted. Both pleas were held bad on demurrer. There was clearly no satisfaction, because the forbearance of C. M. was only the act of a third party. The remarks which appear to be in favor of the present defendants were extrajudicial. It was said that the agreement was either illegal or no satisfaction; now, as it clearly was no satisfaction, the illegality is not shown by the decision. Lord Ellenborough insists also upon the right of the crown to the statutable penalty in that case; this ground (if not removed by *Rex v. Crisp*, 1 B. & Ald. 282, is inapplicable here. Lord Ellenborough's language may be dwelt upon; but, if it be understood in the sense requisite for the defendants, his reasoning goes too great a length; for it would apply to all proceedings which are criminal in form. He did, however, seem to go as far in *Poole v. Bousfield*, 1 Campb. 55, (1807,) where, at *Nisi Prius*, he held that an agreement to discharge from a debt, in consideration of the debtor not moving in court to make the creditor answer the matters of an affidavit, was illegal and void. Probably the reliance will principally be on the language used in *Edgcombe v. Rodd*, 5 East, 303, by Le Blanc, J., who said that the prosecution was for a public misdemeanor; that, if the plaintiff had acted illegally, the defendants ought not to have consented to the bargain; if legally, his discharge could be no consideration, and the consent of the defendants was unnecessary. It is clear that this asserts too much. All indictable offences are public; and, if it be sought to distinguish between those cases where an action will lie, and those where it will not, the principle fails; it may well be that the public is more interested in some cases where an action will lie than in some where it

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will not. A riot or an unlawful assembly may produce injury to the prosecutor. In *Beeley v. Wingfield*, 11 East, 46, (1809,) a party convicted at Quarter Sessions of a misdemeanor, in ill treating his parish apprentice, gave the prosecutor, a parish officer, a promissory note to cover part of the expenses of prosecution; in consideration of which the Court of Quarter Sessions passed a sentence lighter than would have been passed otherwise. This court held the consideration for the note to be not illegal. No stress can be laid on the circumstance that the party there had been convicted; it appeared, as a fact, that the payment did interfere with the course of justice; the objection was quite as strong as on the third count in the present case, where the agreement is stated to be for the costs of the prosecution. If such an arrangement is to be permitted at all, it is better that it should be made at an early stage. In *Baker v. Townsend*, 7 Taunt. 422, (1817,) a party was convicted at Quarter Sessions of an assault; and the court respited the judgment, and allowed that, and another alleged assault, and all matters in difference, to be referred; the arbitrator awarded a sum in satisfaction of the assaults, and another in satisfaction of all costs incident to the proceedings; and, debt being brought on the award, the count was held good on demurrer. In a recent case, *Elworthy v. Bird*, 2 Sim. & Stu. 372, an agreement for a separation of husband from wife, though comprehending a compromise of indictments for assault, was enforced in equity. In *Kirk v. Strickwood*, 4 B. & Ad. 421, an action was brought on a promissory note given by a party convicted of disobeying an order of maintenance, to cover the amount of maintenance due and costs, sentence having been deferred with a view to the arrangement; and the party, after giving the note, was fined a shilling and discharged. This court, on the authority of *Beeley v. Wingfield*, 11 East, 46, held the action maintainable.

In Comyn on Contracts, p. 24, (2d ed.) ch. 2, the rule (8,) adopted from Pothier's *Traité des Obligations*, Part I., ch. 1, sect. 1, art. 7, § 98, tome 1, p. 45, (ed. 1781,) is thus given: "However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of." If, therefore, there be any state of facts, consistent with the record, under which the agreement declared upon could be legal, it is not to be gratuitously assumed that the contractors had any thing illegal in view; and then the declaration is not answered. To the same effect are *Jones v. Waite*, 5 New Ca. 341, in Exchequer Chamber; affirming the judgment of Common Pleas in *Waite v. Jones*, 1 New Ca. 656; judgment of Exchequer Chamber affirmed in Dom. Proc., *Jones v. Waite*, 9 Cl. & Fin. 101; *Haines v. Busk*, 5 Taunt. 521; *Sewell*

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v. *The Royal Exchange Assurance Company*, 4 Taunt. 856; and *Harrington v. Klopprogge*, note (a) to *Palmer v. Bale*, 2 Br. & B. 678; and the principle was taken for granted in *Holland v. Hall*, 1 B. & Ald. 53. The agreement is, not to proceed further. Now, if the attorney general had entered a *nolle prosequi*, the plaintiff would have necessarily abstained from proceeding; that is the only mode, strictly speaking, of discontinuing an indictment; *Elworthy v. Bird*, 2 Bing. 258; and, from *Rex v. Fielding*, 2 Bur. 719, it is probable that the attorney-general would have so acted, the plaintiff having received compensation. A similar principle was acted on by Lord Hardwicke in *The Mayor &c. of York v. Pilkington*, 2 Atk. 302. Besides, it is not averred here that any public crime had been committed; there is no averment of a riot, or of an assault upon a public officer, in fact. The last four counts of the indictment itself contain no charge of assaulting any public officer, but only G. Key and other individuals; this is therefore quite within the principle of *Harrington v. Klopprogge*, 2 Br. & B. 678, where the agreement was held good for so much as could lawfully be agreed for. Suppose the defendants were innocent; might not the plaintiff abstain from proceeding?

[MAULE, J. Would that be a good bargain in the case of an indictment for felony?]

Cases of felony are distinguished from those of misdemeanor; it will be admitted that in some cases indictments for misdemeanor may be compromised for money.

Martin, contra. It appears by the record that the promise here was made in consideration of the plaintiff abandoning a prosecution for assault on persons acting in aid of a peace officer in the execution of his duty; an offence which, by stat. 9 Geo. 4, ch. 31, § 25, subjects the offender to two years' imprisonment with hard labor. That is, at any rate, a part of the agreement which is illegal; and, if illegal, it vitiates the whole; as appears by the authorities cited in Mr. Smith's note to *Collins v. Blantern*, 1 Smith's Lea. Ca. 169; the judgment of Tindal, C. J., in *Shackell v. Rosier*, 2 New Ca. 634, 646; and Com. Dig. Action upon the Case upon Assumpsit, (B 13,) (F 4,) (F 7.) The consent of the court could give no legality to such a contract. It is suggested that a *nolle prosequi* would be a legal mode of putting an end to the indictment; but, if the prosecutor were to engage, for a payment of money, to obtain the *nolle prosequi*, that could constitute no legal contract. The argument proves too much; the attorney-general might enter a *nolle prosequi* on an indictment for felony. The cases mentioned in the latter part of the argument on the other side, are inapplicable to the present question.

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Holland v. Hall, 1 B. & Ald. 53, cited for the plaintiff, is a strong authority against him. There the contract was *prima facie* illegal, though, if certain other facts had existed, which were not shown either to exist or not to exist, the contract would have been lawful. But the court held it to be illegal; and Abbott, J., said: "If there be, on the face of the agreement, an illegal intention, is it too much to say, that the burden lies on the party who uses expressions *prima facie* importing an illegal purpose, to show that the intention was legal?" *Harrington v. Klopprogge*, 2 Br. & B. 678, decides merely that, where a party agrees to assign any office of which he may become possessed, this will be construed as having in view only assignable offices. *Haines v. Busk*, 5 Taunt. 521, was the case of an action by a broker against his principal for commission; and the decision was merely that the principal could not set up as a defence that what was done for him by the broker would be illegal unless he, the principal, took certain steps. *Elworthy v. Bird*, 2 Bing. 258, shows that a discontinuance of an indictment, technically speaking, requires the act of the attorney-general; under what circumstances this can be the foundation of a contract, is not decided. All that Lord Hardwicke did in *The Mayor, &c. of York v. Pilkington*, 2 Atk. 302, was to prevent parties who were plaintiffs before him from prosecuting the same matter criminally in a court where they would themselves have been judges. *Rex v. Fielding*, 2 Bur. 719, shows nothing as to the terms on which a prosecution may be put an end to; it contains only an intimation that the attorney-general would probably stay it when the prosecutor had commenced a civil action. It is true, as the plaintiff contends, that the declaration is not answered unless the illegality appear plainly; but it does so here. The question is, not merely whether it be an offence to forbear prosecuting for a misdemeanor, but whether the law will enforce a contract to pay money for such forbearance. The difficulty of distinguishing between different kinds of misdemeanor has been urged on the other side. There is, no doubt, such a difficulty; and, if the question were quite new, probably the courts would hold it illegal to compromise for money any prosecution whatever. This seems to be the view of Alderson, B., in *Garth v. Earnshaw*, 3 Younge & C. Exch. 584. At the utmost, the legality must be confined to cases in which the whole matter of the indictment is, such as to admit of satisfaction by a payment to the prosecutor.

As to the cases cited in the earlier part of the argument for the plaintiff. *Rex v. Crisp*, 1 B. & Ald. 282, was a decision only on the statute 18 Eliz. ch. 5. *Williams v. Hedley*, 8 East, 378, is rather in favor of the defendants; for it was there held that money paid to compromise a prosecution for misdemeanor might be recovered back,

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the objection being that the person paying was *particeps criminis*, which the court overruled on the ground that he was not an informer, a plaintiff, or a party suing out process, so as to be within the prohibition of stat. 18 Eliz. ch. 5, §§ 3, 4. In *Johnson v. Ogilby*, 3 P. Wms. 279, no more appears than a suggestion of counsel, not expressly adopted by the court; and from Mr. Cox's note (1) there it rather seems that the court disallowed it. In 1 Story's Equity Jurisprudence, pp. 297, 298, § 294, (ed. 3, 1843, Boston,) it is said: "Agreements, which are founded upon violations of public trust or confidence, or of the rules, adopted by courts in furtherance of the administration of public justice, are held void." "Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration. They have a manifest tendency to subvert public justice." The report of *Drage v. Ibberson*, in 2 Esp. N. P. C. 643, is probably incorrect; it states that Lord Kenyon said "he should adhere to the class of cases which held, that the consideration being the settling a misdemeanor, might be good in law;" but there is no such class. The nonsuit in that case may, however, be supported on another ground; however incorrect the transaction, trover would not lie for the paper on which the note was written, inasmuch as the property was parted with, though the note itself might be one which could not be indorsed. The cases cited from Kyd on Awards seem to suggest a sound limitation; namely, that no compromise should be allowed except when, there having been a conviction, the court, though it suspends the judgment or inflicts only a nominal punishment, retains in its own hands the control of the proceeding till it comes to its technical close. There seems, also, to be no objection to parties being bound over not to commit an offence. *Rez v. Lord Falkland*, Kyd on Awards, 66, (2d ed.) appears to have been a hasty proceeding, not well considered. *Edgcombe v. Rodd*, 5 East, 294, has not been distinguished; the reasoning of Le Blanc, J., cannot be answered. It does not appear that in *Fallowes v. Taylor*, 7 T. R. 475, there was more than a bond conditioned to remove the nuisance; no stipulation to abstain from prosecuting appears. It is admitted that *Poole v. Bousfield*, 1 Campb. 55, is a direct authority for the defendants. *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunt. 422; and *Kirk v. Strickwood*, 4 B. & Ad. 421, are explainable on the ground already pointed out; there had been convictions in all those cases. There was also a conviction in *Elworthy v. Bird*, 2 Sim. & Stu. 372; and, besides, the argument there seems to have turned on the distinction between different kinds of assault; it was not suggested that an indictment for a riot or for an assault on a public officer could be compromised. This case therefore must be decided on the principle affirmed in *Collins v. Blantern*,

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2 Wils. 341, 347. It is immaterial whether the defendant was guilty or not; if he was, the prosecution ought not to have been compromised; if he was not, it ought not to have been instituted, or to have been persevered in, and the abandonment of it can be no consideration. The authorities are collected in Chitty on Contracts, p. 674, (3d ed.)

Bliss, in reply. Only one of the indictments in *Elworthy v. Bird*, 2 Sim. & Stu. 72, had been prosecuted to conviction when the compromise took place. The difficulty felt by Alderson, B., in *Garth v. Earnshaw*, 3 Young & C. Exch. 584, seems to have arisen, not from the compromise of the indictment, but from the relation of husband and wife; the report is, however, very unsatisfactory. The distinction between cases where there has, and those where there has not, been a conviction will not account for the distinction between felonies and misdemeanors. Even in the case of a conviction, it would be in the power of the prosecutor to abstain from bringing the defendant up for judgment. The class of cases adverted to by Lord Kenyon in *Drage v. Ibberson*, 2 Esp. N. P. C. 643, is sufficiently shown by *Collins v. Blantern*, 2 Wils. 341, 347, and *Johnson v. Ogilby*, 3 P. Wms. 279, and by the notorious practice of compromising assaults. The authorities cited in the latter part of the argument for the plaintiff were not brought forward as establishing the general legality of compromises; the answers given to them are therefore inapplicable. *Haines v. Bush*, 5 Taunt. 521, was not decided on the ground now suggested for the defendants, but on the legality of the compromise.

Cur. adv. vult.

TINDAL, C. J., in this vacation, (June 13,) delivered the judgment of the court.

This was an action on an agreement, by which the defendants, in consideration (*inter alia*) that the plaintiff, being the prosecutor of an indictment preferred against certain persons for an assault and riot, would not proceed further on such indictment, undertook and promised plaintiff to pay him a certain amount of money.

The declaration averred that, in pursuance of such agreement, the plaintiff did not proceed further with the indictment, and did, with the assent of the then defendants, inform the court, before which the indictment was pending, of the premises, and, by leave of the court, forbore to give evidence upon the indictment; and that thereupon the said defendants in such indictment were acquitted.

The defendants pleaded several pleas to this action; but the most material plea is that which raised the question, whether the consid-

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eration for the said supposed promise was illegal, and the promise therefore void.

Upon demurrer, the Court of Queen's Bench held this to be so; and the same question has been argued before us on the writ of error. And we think the judgment of the Queen's Bench was right.

It seems clear, from the various authorities brought before us on the argument, that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of *Collins v. Blantern*, 2 Wils. 341, 347, which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. It is difficult to comprehend the case of *Johnson v. Ogilby*, as reported in 3 P. Wms. 277, 279. There a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanor seems to have been the foundation of the decision, if it was made, by Lord Talbot, a distinction overruled in *Collins v. Blantern*, 2 Wils. 341, 347, which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised, as a part of the agreement, or that the fraud was an indictable one; and perhaps the case may be so explained. If not, it cannot, we conceive, be sustained as law.

In *Drage v. Ibberson*, 2 Esp. N. P. C. 643, however, Lord Kenyon adverted to, and stated that he should adhere to the class of cases which held that the consideration for an agreement, being the settling of a misdemeanor, might be good in law. Thus a settlement of an indictment for a nuisance, preferred by public authority, was held a lawful consideration for a bond binding the defendant to remove the nuisance; we presume, on the ground, which however is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. *Fallowes v. Taylor*, 7 T. R. 475). But the court seem to have overlooked the consideration that a defendant, who had infringed a public right, was thereby entirely freed from the punishment due to a violation of public law. In *Edgcombe v. Rodd*, 5 East, 294, Le Blanc, J., assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanor, and not for a private injury to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in *Fallowes v. Taylor*, 7 T. R. 475; nor can *Poole v. Bousfield*, 1 Camp. 55, be reconciled with it. There, an agreement to stifle a motion against the defendant, that he should answer the matters of an affidavit, was held illegal.

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But there is a class of cases, such as *Beeley v. Wingfield*, 11 East, 46, and *Baker v. Townsend*, 7 Taunt. 422, which do not at all break in upon sound principles. These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. As Gibbs, C. J., in the latter case, well observes, "the parties have referred nothing but what they have a right to refer. They have referred the several assaults;" (by which we understand him to mean their several rights to damages for those assaults,) "these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights;" which words show our previous interpretation to be correct. The case of *Beeley v. Wingfield*, 11 East, 46, was after conviction; and the promissory note seems merely to have been given for the expenses of the prosecution, and was obviously a part of the punishment inflicted by the court after conviction of the offence.

Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further.

In the case before us, the offence is an assault coupled with *riot* and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence.

Nor do we think that the assent of the judge was material.

We entirely agree in the observations of the Court of Queen's Bench as to this part of the case; and we think the judgment of the Queen's Bench must be affirmed.

Judgment affirmed.

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JONES *v.* RICE.¹

1836.

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A promissory note, given for compounding a public prosecution for a misdemeanor, is founded upon an illegal consideration.

ASSUMPSIT on a promissory note, dated January 1, 1835, made by the defendant to the plaintiff, for \$147.

At the trial, before SHAW, C. J., it appeared that on the night of December 31, 1834, a ball was given at the house of Joel Jones, in Sudbury; that an attempt was made, by the defendant and others, to interrupt the ball by violence; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball; that a complaint was filed before a justice of the peace, and a warrant issued by him against some of the rioters; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of \$184; that, of this amount, the sum of \$40 was for damages sustained by three individuals, \$10 for the services of the officer, and \$2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted, by those assembled at the ball, that if the accused would pay the sum proposed, or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms, and paid about \$40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c., and all other demands of any name or nature of said ball party;" and that, in consequence of this arrangement, the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The chief justice was of opinion that the plaintiff was not entitled to recover, because the evidence proved a want of consideration, or a bad consideration, for the note; and the plaintiff consented to a non-suit, subject to the opinion of the whole court.

¹ 18 Pickering, 440.

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Hoar, for the plaintiff, did not contend that a promise made for the purpose of compounding a criminal prosecution is founded on a good consideration, although it had been so held in England where the offence was under a felony; but he relied on the point, that the plaintiff might have maintained a civil action for the injury sustained by him, and had a right to compromise such action, and that such right was not affected by the circumstance, that an offence against the public had been committed at the same time. *Collins v. Blantern*, 2 Wils. 341; *Edgcombe v. Rodd*, 5 East, 294; 1 Chitty on Criminal Law, 4; *Harrison v. Parker*, 6 East, 158; *Drage v. Ibberson*, 2 Esp. R. 643; *Fallowes v. Taylor*, 7 T. R. 475; *Johnson v. Ogilby*, 3 P. Wms. 276; *Petersdorf's Abr. Compounding*; 4 Bl. Comm. 136.

S. H. Mann, for the defendant, cited *Collins v. Blantern*, 2 Wils. 341; *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunt. 422; 4 Bl. Comm. 363.

PUTNAM, J., delivered the opinion of the court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offence against the public. The sum of \$52 was given for the damages and expenses, and \$132 for the compounding of the misdemeanor; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In *Drage v. Ibberson*, 2 Esp. R. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was good in law. And the case of *Fallowes v. Taylor*, 7 T. R. 745, proceeds upon the same principle. It was there held, by Lord Kenyon and the rest of the court, that a bond given to the plaintiff, (who was clerk of the Quarter Sessions, and who was directed to prosecute the defendant for a public nuisance,) conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a

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direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russell on Crimes, 210; *Edgcombe v. Rodd*, 5 East, 301.

The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use money, which properly should be levied as a fine upon the criminal party for the use of the Commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note, to secure to his own use four times as much as, in his own estimation, his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial, for no part of it belonged to the party. He might settle for his own damage from the riot; but it would enable the party to barter away the public right for his own emolument if we were to hold that the consideration of this note was lawful.

We are all of opinion that the nonsuit must stand.

The question discussed in *Keir v. Leeman* is of very general interest, and the case itself one of great authority. Nothing can be of greater importance than that the law should be well settled and understood upon the question, in what cases, and to what extent, public offences may be lawfully made the subject of private compromise and arrangement; and yet it is remarkable how little authority was to be found upon the subject, and, of that little, how much that was conflicting and uncertain. The full examination of the subject in the cases in the text, renders further discussion of it unnecessary. The old rule, that the law will not allow a criminal charge to be disposed of by private agreement or compromise, applies universally in cases of felony. Any agreement not to give evidence against a party accused of felony, on his trial, or in any way to compound such a charge, was long since held to be entirely illegal and void. And so far is this principle carried, so entirely void is such a contract, that a note given to compound a felony is void even in the hands of a *bonâ fide* indorsee. *Bell v. Wood*, 1

Bay, 249, *dictum*; the note in this case having been overdue when passed to the plaintiff. To render a promise void, however, because the consideration was the stifling of a criminal prosecution, the promise must be made for gain, and not merely from motives of kindness and compassion. *Ward v. Allen*, 2 Metcalf, 53; *Commonwealth v. Pease*, 16 Massachusetts, 94.

This principle was settled in *Jones's case*, reported in 1 Leonard, 203, as follows: "Hen. Jones had stolen the Plate of Trinity Colledge in Oxford, and by mediation of his friends it was concluded and agreed, that no Evidence should be given against him at the Sute of the Colledge, and that the Colledge should be recompenced for the losse, and two of his Friends, Brien and Brice were bound unto Doctor Underhil, Rector of Lincoln Colledge in Oxford, (but unto the use of the Master and Scholrs of Trinity Colledge) upon condition that if the said Obligor paid forty pounds within six months after the said Hen. Jones should be acquitted & released of the troubles wherein he now is, with the safety of his life, that then, &c. In

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debt upon the Obligation The Defendants pleaded that he was indicted at the Assizes at Ox. Arraigned upon it, *scil.* for the stealing of the said Plate, and found guilty thereof, and had his Clergy, and was burned in the hand, & he demanded Judgment of this Action, upon which there was a Demurrer: Wind. If the words had been to pay the money, after that Henry Jones should be released and acquitted of the troubles in which he now is without any more, the Defendants had been bounden to pay the money. Periam. If the words of the condition had been, that after Henry Jones should be acquitted of the Felony, then no money payable, but here the words are with safety of his life: but here he conceived, that the intent of the Obligation was, that no Evidence should be given, and so to save his life from the Gallows, for which the Defendants might have shewed the special matter, and averred that the Obligation was made for the discharge of a Felon, and so against the Law, &c. but now, they cannot take advantage of it, and afterwards Judgment was given for the Plaintiff."

In *Mason v. Watkins*, 2 Ventris, 109, the rule adopted in *Jones's case* was followed: "An Action of Debt, upon a Bond of 20l. The Defendant demanded Oyer of the Condition, which was, That the Obligor should not himself bring any Evidence at the Assizes to prove the two Cows now in Question between one Owen Mason the Younger, and the said Watkins, to be the Cows of the said Watkins or of Robert Gillo; and that the said Gillo shall set in a Bill of Ignoramus, that then the Bond should be void. The Defendant pleaded *quod ipse de deb præd. virtute Scripti Obligat prædict' onerari non debet*, because that one of the said Cows was the Cow of the said Watkins, and the other of the said Gillo; and that before the Bond, Owen Mason jun. in the said Condition mentioned, being the Plaintiff's Son, stole the said two Cows, and was imprisoned thereupon; and the Defendant Watkins was bound by Recognizance to prosecute him at the Assizes for the said Felony; and there

the said Mason jun. was indicted and convicted, and the Defendant did give Evidence that one of the Cows was his, *prouit bene licuit*, and that the Defendant did not give any Evidence by himself, or any one else, to prove the two Cows to be the Cows of the Defendant, or the Cows of the said Gillo, *§ hoc paratus est verificare, &c., unde petit judicium, &c.* To this the Plaintiff demurred, and upon the first Opening, Judgment was given for the Defendant; for the Condition is against Law, viz. to shift off Evidence of Felony, and that makes the Bond void, *vide Jones's case*, 1 Leonard, 203, and the Court recommended it to Serjeant Pawlet, who was a Judge in Wales where the Plaintiff lived, to see to have him prosecuted for taking such a Bond."

In *Plumer v. Smith*, 5 New Hampshire, 553, a person had been arrested for passing counterfeit bills; the defendant agreed to pay the prosecutors for their loss by the counterfeit money, and for their expenses, and also to indemnify them against their recognizances to appear against the accused party; and borrowed the money of the plaintiff for this purpose, and with his knowledge that it was to be so used. The money was paid to the prosecutors, and they did not appear against the accused, and their recognizances were forfeited. It was held, that the plaintiff could not recover the money lent for this illegal purpose. See also *Shaw v. Spooner*, 9 New Hampshire, 200; *Hinesburgh v. Sumner*, 9 Vermont, 23.

In *Hinds v. Chamberlain*, 6 New Hampshire, 225, the defendant being sued for an assault and battery, compromised with the plaintiff, giving his note for \$25, the plaintiff agreeing, as part of the consideration for the note, that he would also indemnify the defendant against any public prosecution which might be instituted for the same amount. The note was held entirely void, Parker, J., saying: "How is an individual to indemnify in such case? He has no power to stay the arm of public justice. He has no authority to prevent a prosecution. Any attempt so to do, by suppressing evidence, would be of itself illegal. *Plumer v. Smith*, 5 New

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Hampshire, 553. If a prosecution is instituted, and conviction follows,—and it may here be remarked that all parties seem to have understood that an offence had been committed, although the obligees did not expressly admit it,—the sentence of the law might be imprisonment of the offenders. But the obligor could not be vouched in to receive the sentence, and be subjected to the imprisonment in the place of those who had committed the crime, nor could he voluntarily offer himself to appease the demands of the law against the obligees. They must suffer the imprisonment; and how, then, is indemnity to be made, and compensation given for imprisonment in pursuance of a legal sentence of a court of justice, for an offence against the laws of the land. If the defendant were thus lawfully imprisoned, surely he would not be heard in courts of justice, in an action on his bond, to recover an indemnity for the suffering which the law had imposed on him for its violation; nor, it is believed, was a hearing in chancery ever yet known to estimate in dollars and cents how much damage it had been to an individual that the righteous judgment of the law had been executed upon him." See *Corley v. Williams*, 1 Bailey, 588; *Vincent v. Groom*, 1 Yerger, 430. And although a discontinuance be obtained by consent of the prosecuting officer, it has yet been held, that a contract to pay for procuring such discontinuance is void. *Shaw v. Reed*, 30 Maine, 105.

But an agreement to settle a misdemeanor may, in some cases, be perfectly valid; and indictments for various species of misdemeanors are continually, and with the sanction of the courts, referred to an arbitrator for decision. *Drage v. Ibberson*, cited in the judgments in the text; *Blanchard v. Lilly*, 9 East, 497; *Russell on Arbitration*, (London ed. 1856,) 12. A rule of very general application, as to what criminal matters may be referred, is thus stated by Gibbs, C. J., in *Baker v. Townshend*, as reported in 1 Moore, 124: "Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the

adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced."

A similar rule is laid down in the following case. An indictment for a conspiracy, to obstruct persons in carrying on their business as owners of omnibuses, had been referred, at the suggestion of the judge before whom the trial had commenced. On the case coming before the Court of King's Bench, on another point, Patteson, J., in his judgment, adopted, as containing a statement of the common law, the following passages from a note to Chitty's Statutes, 1 Chitty's Statutes, 33, note (b) to Stat. 9 & 10 W. 3, c. 15: "That criminal offences which are personal, such as assault," &c., "and for which an action of damage would lie, may, it is said, be submitted to arbitration;" and "if an indictment has been preferred in any such case, the matter of complaint may still be referred by leave of the court." *Rex v. Bardell*, 5 Adolphus & Ellis, 619; S. C. reported as *Rex v. Skilibeer*, 5 Dowling, 238. Referring to the above case on a subsequent occasion, the court, adopting the principles above cited, declined to lay it down as law, that an indictment for conspiracy could be referred. *Regina v. Hardey*, 14 Queen's Bench Rep. 529.

In cases of ordinary assaults, where the party injured has proceeded by indictment, all the authorities concur that the policy of the law will admit of a compromise or reference. *Eldorothy v. Bird*, cited by Lord Denman in the text; *Blake's case*, 6 Rep. 43; *Horton v. Benson*, Freeman, 20; *Russell on Arbitration*, (London ed. 1856,) 14. In several of the United States, provision is made by statute for compromising certain misdemeanors in special cases.

It is quite clear that an indictment for perjury cannot legally be referred. *Regina v. Hardey*, 14 Queen's Bench Rep. 529; *Collins v. Blantern*, 2 Wilson, 341. Notwithstanding an opinion expressed in an earlier case, *Rex v. Cotesbatch*, 2 Dowling & Ryland, 265, it is now decided that an indictment for non-repair of a highway is

Compromise of a Misdemeanor.

not capable of being lawfully determined by arbitration, as it is not a case in which the party injured had a remedy by action. *Regina v. Blakemore*, 14 Queen's Bench Rep. 544. See *Rez v. Cotton*, 3 Campbell, 444. A presentment and proceedings before commissioners of sewers, to procure the removal of some weirs and hatches in a river, have been made the subject-matter of a valid award. *Doddington v. Bailward*, 7 Dowling, 640.

After conviction, a compromise has often been sanctioned by the courts. Thus, agreements of compromise made by the defendants, with the approval of the court, after conviction of the several misdemeanors of ill-treating a parish apprentice, *Beeley v. Wingfield*, 11 East, 46, and of disobeying an order of maintenance, made by justices, have been sustained as legal. *Kirk v. Strickwood*, 4 Barnwell & Adolphus, 421; 1 Neville & Manning, 275; see also *Goodall v. Lowndes*, 6 Queen's Bench Rep. 464. In criminal matters, after conviction before a court of Quarter Sessions, a reference is lawful; for where a defendant, after conviction before the Quarter Sessions on an indictment for assault, was called up for judgment, and, by the recommendation of the court, the prosecutor and defendant entered into an agreement of reference respecting the matters in difference between them, including the assault and the costs of the indictment; on its being contended, on the strength of *Rez v. Harding*, 2 Salkeld, 477, that the Quarter Sessions had no power to refer the matter to be determined by another, the Court of Common Pleas sustained the validity of the submission. *Baker v. Townshend*, 7 Taunton, 422; 1 Moore, 120.

It seems the better opinion, though there is no express decision on the point, that the consent of the court in which an indictment is pending for trial must be obtained in order that the reference should be effectual.

In the generality of the cases cited with respect to the reference of criminal matters, it will be seen that the sanction of the court was given to the submission or

compromise; and from the statement, 1 Chitty's Statutes, 33, note (b) to 9 & 10 W. 3, c. 15, by Patteson, J., in the case of *Rez v. Bardell*, 5 Adolphus & Ellis, 619, repeated in *Regina v. Hardey*, 14 Queen's Bench Rep. 529: "That if an indictment has been preferred," &c., "the matter may still be referred by the leave of the court," it may probably hereafter be determined that the criminal matters there mentioned, which, before indictment, the parties may submit of themselves, require the leave of the court to give a sanction to the reference after an indictment has been preferred. Russell on Arbitration, (Lond. ed. 1856,) 15, 16.

There is a class of cases, which may here be noticed, in which the consideration has been held to be illegal, as against public policy. In the recent case of *Kingsbury v. Ellis*, 4 Cushing, 578, (1849,) a promissory note was given to the plaintiff, who was a magistrate, for the amount of fines and costs imposed by him upon the defendant, the maker of the note, on a criminal charge. In an action on the note, it was held that the consideration was illegal, being in violation of public duty. Chief Justice Shaw delivered the opinion of the court: "This case is quite distinguishable from that of *Beeley v. Wingfield*, 11 East, 46, cited in the argument; that was a note given to parish officers, at the recommendation of the court, as an indemnity for expenses personally incurred by the parish. But such a proceeding as this is entirely contrary to public policy. If a magistrate, or any other judicial officer, could enter into a negotiation with a convict, take a contract to himself, and enforce it by law, it would operate as a temptation to the judge, and lead to the oppression of the accused by the use of public process. If the judge might take a note with surety, he might take a pledge of personal, or a mortgage of real estate, or make any other contract in his own name. It would, we think, lead to complicated relations between ministers of the law and parties accused, entirely inconsistent with the purity, simplicity, and directness, which should ever characterize the administra-

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tion of the criminal law." A justice of the peace sentenced a prisoner, whom he had convicted of larceny, to pay a fine and costs, and, on his failure to pay them, delivered a mittimus to an officer, who, while conducting the prisoner to jail, took the promissory note of a third person for the amount of the fine and costs, and his own fees, payable to the justice, and discharged the prisoner. The note was held to be void, for illegality of consideration; the court saying that the act of the officer was clearly a violation of his official duty, and against public policy. *Bills v. Comstock*, 12 Metcalf, 468.

But in these cases, as in all other illegal contracts, if the contract has been fully executed — if the money, or other consideration, has been fully paid — it cannot be recovered back. *Worcester v. Eaton*, 11 Massachusetts, 368; *Dixon v. Olmstead*,

9 Vermont, 310; *Bailey v. Brick*, 11 Vermont, 252.

The reader should carefully distinguish the questions discussed in this note from others liable to be confounded with them, in criminal law. The right to take amends applies to many cases of private injuries; yet it is a nice question of fact, whether the amends taken were not intended to operate as a compounding of the public offence. And it is sometimes a nice question of law, whether the court will enforce an obligation given to pay for the private injury, as having been obtained under circumstances calculated to obstruct the course of public justice. It must be remembered that if, in a particular case, the plaintiff is not permitted to prevail in his civil suit, the consequence does not necessarily follow that he would be indictable. See 1 Bishop, *Crim. Law*, § 505. H.

 PIPER v. PEARSON.¹

1854.

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A judge of an inferior court, acting in a case of which he has no jurisdiction, or exceeding his jurisdiction, is liable in damages to any party injured.

Thus, a justice of the peace, who, in the course of the trial of a case of which a police court has exclusive jurisdiction, commits a witness to prison for contempt, is liable to an action by the witness.

As the Police Court of Lowell has exclusive jurisdiction of all offences committed within that city, a record of a conviction, before a justice of the peace for the county of Middlesex, of an offence alleged to have been committed in the city of Lowell, shows *prima facie* a want of jurisdiction in the justice.

The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction.

ACTION of tort against a justice of the peace, residing in Dracut, for assault, battery, and false imprisonment. Answer, that the plain-

¹ 2 Gray, 120.

tiff was imprisoned in the county jail, in due process of law, for a contempt of court.

At the trial, the plaintiff gave in evidence copies, certified by the defendant, of the following papers : A complaint made to the defendant, charging John Russ with an unlawful sale of intoxicating liquors in Lowell; and a warrant issued thereon, for the arrest of Russ; a mittimus issued by the defendant for the commitment of the plaintiff to prison, for refusing to testify on the trial of said complaint before the defendant at Lowell, concerning sales of intoxicating liquors, made by Russ, and known to the witness; and a subsequent judgment of acquittal of Russ by the defendant.

By Stat. 1848, ch. 331, § 4, the exclusive jurisdiction of all crimes and offences, committed within the district of Lowell, is vested in the police court of Lowell.

The defendant relied, for his justification, on the record of the judgment; and contended that no sufficient proof had been adduced to show that his acts were without jurisdiction, and void. But Metcalf, J., ruled that the record and mittimus constituted no defence. And to this ruling the defendant, being found guilty, alleged exceptions.

B. F. Butler, for the defendant. Notwithstanding Stat. 1848, ch. 331, § 4, the defendant might still, as a justice of the peace, hold a court in Lowell, for the trial of offences committed elsewhere in his county. Revised Statutes, ch. 85, §§ 31, 32. It does not appear where the offence was in fact committed; and the magistrate, actually sitting in the exercise of his office, will be presumed to be acting rightfully till the contrary be shown; at least so far as to protect him.

It does not appear but that he was judicially examining the very question of his jurisdiction in this case, when the contempt took place. But the statute does not make the right of the magistrate to commit for contempt depend upon his jurisdiction of a particular case. It provides for two cases; *first*, "such disorderly conduct as shall interrupt any judicial proceedings before him;" or, *second*, "be a contempt of his authority or person." Revised Statutes, ch. 85, § 33. There were judicial proceedings pending before the defendant when he issued his mittimus; and he was the sole judge whether the conduct of the witness was in contempt of his authority, subject only to impeachment for the unjust exercise of his power. *Lining v. Bentham*, 2 Bay, 1; *The State v. Johnson*, 2 Bay, 385.

At the worst, it was but an error of judgment, for which he is not liable, if he acted honestly. If the defendant is not protected, the judges of the circuit courts of the United States, who are occupied a

great portion of the time in trying questions of their own jurisdiction, are liable in damages to the losing party, whenever they decide erroneously in favor of their own jurisdiction; and are not protected, in such cases, from interruption and insult.

The second clause of the statute is intended for the magistrate's protection, as well while he is out of court as while actually sitting. Otherwise, the moment a magistrate had passed upon a particular case, and his jurisdiction had ceased, he would be liable to insult, without any power to punish. By the common law, contemptuous words spoken of a magistrate, though not interrupting his proceedings, are punishable by indictment. *Hollingsworth v. Duane*, Wallace, 77; *Brooker v. Commonwealth*, 12 S. & R. 175.

H. G. Blaisdell, for the plaintiff.

BIGELOW, J. The decision of this case depends on the familiar and well-settled rule concerning the liability of courts and magistrates exercising an inferior and limited jurisdiction, for acts done by them, or by their authority, under color of legal proceedings.

One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and, at the same time, to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But, on the other hand, if they act without any jurisdiction over the subject-matter; or if, having cognizance of a cause, they are guilty of an excess of jurisdiction; they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is, whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined. 1 Chit. Pl. (6th Am. ed.) 90, 209-213; *Beaurain v. Scott*, 3 Campb. 388; *Ackerley v. Parkinson*, 3 M. & S. 425, 428; *Borden v. Fitch*, 15 Johns. 121; *Bigelow v. Stearns*, 19 Johns. 39; *Allen v. Gray*, 11 Conn. 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser. 1 Chit. Pl. 210; 19 Johns. 39. See *Clarke v. May*, 2 Gray, 410.

These well-settled principles leave no room for question as to the liability of the defendant in this action. As a justice of the peace for the county of Middlesex, he had no jurisdiction whatever to try the complaint against Russ. It was for an offence committed "within the district of Lowell," of which the Police Court of the city of Lowell had exclusive jurisdiction by Stat. 1848, ch. 331, § 4, and which the justice of said court was legally competent to try and determine. *Commonwealth v. Emery*, Middlesex, 1853. The defendant, therefore, acted wholly without legal authority, and can show no legal justification under any judicial record.

It was urged, on the part of the defendant, that he had authority to punish the plaintiff for contempt, although he had no jurisdiction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. It is to enable him to try and determine causes without molestation, and protect himself from indignity and insult, that the law gives him authority to punish such disorderly conduct as may interrupt judicial proceedings before him, or be a contempt of his authority or person. Revised Statutes, ch. 85, § 33. But it is only when he is in the proper exercise of his judicial functions that this power can be exercised. If he has no jurisdiction of a cause, he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case, he cannot exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint against Russ than any other individual in the community. Although he acted through mistake, it was, nevertheless, an usurpation. The plaintiff, therefore, could not have been guilty of contempt toward the defendant in his capacity as a magistrate, while trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void.

It was suggested, by the counsel for the defendant, that there was nothing in the case from which it could be properly inferred that the offence with which Russ was charged was actually committed in the city of Lowell; and that as the defendant, by virtue of his authority as a justice of the peace, had cognizance of offences committed elsewhere in the county of Middlesex, which he might well hear and determine in the city of Lowell, the presumption was that he was acting rightfully till the contrary was shown. But there are two

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decisive answers to this argument. In the first place, the record on its face, sets out an offence committed in the city of Lowell. That being a district set apart by statute, in which the Police Court has exclusive jurisdiction of criminal offences usually cognizable by magistrates, and the offence being charged as having been committed in Lowell, the record legally imports that it was committed there. 1 Stark. Crim. Pl. (2d ed.) 62; Bac. Ab. Indictment, G. 4.

But, in the next place, it was for the defendant to show a complete justification for the alleged trespass; if the record left it doubtful whether he had jurisdiction of the offence, it would not avail as a defence to the action. There is a marked distinction, in this respect, between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is that they had jurisdiction, until the contrary is shown; but, with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction. *Peacock v. Bell*, 1 Saund. 74, and notes; *Mills v. Martin*, 19 Johns. 33, 34. The record in the present case *prima facie* shows a want of jurisdiction in the defendant.

Exceptions overruled.

CALDER v. HALKET.¹

December 5, 1839, and July 4 and 8, 1840.

Judges — Liability of, to an Action.

Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact.

The 21 Geo. 3, ch. 70, § 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bona fide*, in cases in which they have mistakenly acted without jurisdiction.

THIS was an action of trespass, brought by the appellant against

¹ 3 Moore, P. C. 28. Before the Privy Council. On appeal from the Supreme Court of Judicature, at Fort William, Bengal. Present: Lord BROUGHAM, Mr. Baron PARKE, Mr. Justice BOSANQUET, The Right Hon. Dr. LUSHINGTON.

the respondent, in the Supreme Court of Judicature, at Fort William, to recover damages for the arrest and false imprisonment of the appellant, by the respondent, in his character of judge and magistrate of the Foujdarry (Criminal) Court of the Zillah of Nuddeah, in Bengal.

The appellant was the manager of a factory at Bayadangah, in the same Zillah, belonging to Mr. David Andrews. Both the appellant and respondent were European British-born subjects. The proceedings which gave rise to the imprisonment complained of were as follows :—

On the 29th of July, 1834, an affray took place in a village called Dutt Boahleah, within the Zillah of Nuddeah. On the following day, the police Darogah of the adjoining Thanah (police station) of Hanskolly, within which the village of Boahleah is situate, reported the particulars of the riot to the respondent, as acting magistrate of the Foujdarry Court of the Zillah of Nuddeah, and transmitted the depositions of the wounded persons, as well as of some of the witnesses of the affray.

The respondent, Mr. Halket, being of opinion that the appellant was concerned in the riot, directed a Robocarree (or order of instructions for the mode of proceeding in the case) of the Foujdarry Court at Kishnaghur, to be made and passed, by which it was ordered, amongst other things, that a Perwannah should be written and directed to the Darogah, for the apprehension of Mr. Calder.

The Robocarree was signed by the respondent, and a Perwannah was accordingly issued on the same day, and delivered to the Darogah of the Thanah of Hanskolly; under the authority of which, the appellant was detained, and kept under surveillance of two Burburdanzes, (matchlock-men,) within the boundaries of Mr. Andrews's factory.

The appellant was ultimately brought before Mr. Halket, the respondent, as acting judge of the Foujdarry Court, at Kishnaghur, and, after some days' investigation, admitted to bail; and was eventually bound by recognizance to appear when called upon. The greater part of the other prisoners charged with being concerned in the riot were convicted, and sentenced to different periods of imprisonment, but no further proceedings were taken against Mr. Calder.

Upon the 6th of March in the following year, 1835, Mr. Calder commenced an action of trespass in the Supreme Court at Calcutta, against Mr. Halket, for assault and false imprisonment. The declaration contained three counts. The first alleged that the respondent assaulted and imprisoned the appellant for thirty-four days, at Bayadangah. The second, that the respondent had laid hold of the appellant, and compelled him to go from a house in Bayadangah to a

place called Poolia, and from Poolia back to Bayadangah, and then to Kishnaghur, and there imprisoned him for twenty-five days. And the third count alleged that the respondent had assaulted and imprisoned the appellant at Kishnaghur, for thirty-four days.

The respondent pleaded the general issue; and also six special pleas, justifying the said several arrests and imprisonments, as done by him as magistrate of the district of Nuddeah, in the province of Bengal, and of the Criminal Court of the same district.

The appellant joined issue upon the first plea, and replied *de injuria* to the six special pleas upon which issue was joined.

The cause came on for trial before the Supreme Court, on the 23d of July, 1835, when several witnesses were examined on both sides, and a verdict was given for the plaintiff on all the issues joined in the action, with damages to the amount of five hundred sicca rupees, but with liberty for the respondent to move that the verdict should be set aside, and a nonsuit, or verdict for the respondent, entered instead thereof, upon three several points reserved, namely: 1st. That there was no proof of the arrest of the appellant by the respondent's order; 2d. That under the provisions of the Statutes 21 Geo. 3, ch. 70, § 24, and 53 Geo. 3, ch. 155, § 105, and the Bengal Regulations in force in the Presidency, the respondent was not liable to the Supreme Court in an action for damages, the acts proved appearing in evidence to have been acts done by him as magistrate of the Provincial Court of Kishnaghur; and 3d. That under the general issue a sufficient justification was proved.

A rule *nisi* to that effect was granted on the 2d of November.

On the 24th of November, 1835, the several points reserved were argued before the Supreme Court, who were of opinion that the arrest, having taken place under the seal of the Foujdarry Court, and the appellant being a British-born subject, and not amenable to the jurisdiction of the Foujdarry Court of the Zillah, the respondent had failed to support his special pleas. They were, however, of opinion, that under the general issue, the respondent was entitled to avail himself of the protection of the 24th section of the Statute 21 Geo. 3, ch. 70, which precluded the Supreme Court from holding jurisdiction in the action against the respondent, and accordingly adjudged that the verdict should be entered for the respondent on the general issue, with costs, and costs of motion.

From this judgment the appellant appealed to her Majesty in Council.

Mr. *M. D. Hill*, Q. C., and *C. Buller*, for the appellant. The judgment of the Supreme Court cannot stand; they admit the trespass, but say they have no jurisdiction to try the question, the respondent

having acted in his magisterial capacity, and not being amenable to the Supreme Court. This is contrary to law, as well as against the true construction of the Acts 21 Geo. 3, ch. 70, and 53 Geo. 3, ch. 155. The rule at law is, that if an action be brought against a judge of record, for an act done by him in his judicial capacity, he must plead that he did such act as a judge of record, before he can avail himself of such justification. Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowp. 172. The respondent pleaded the general issue. Now supposing him to be a judge of record, that is clearly insufficient; but he also pleaded specially, that the acts were done by him in his magisterial capacity; yet the court held these pleas were not supported, but they held the plea of the general issue sufficient, under the 21 Geo. 3, ch. 70, §§ 2, 24. That act was passed to explain and amend the previous one of 13 Geo. 3, ch. 63, under which the Supreme Court was first established. By the second section it is provided, that persons impleaded in the Supreme Court, for acts done by order of the governor-general in council, may plead the general issue. But the trespass of the respondent was not an act so done. The respondent is a judge of the Foujdarry Court, and, according to the Bengal Regulation I. of 1772, Judicial Regs. of 1769 to 1792, para. 5, first establishing that court, but an officer of police, having no jurisdiction over any but natives; and though appointed by the governor-general in council, the acts done by him in his judicial capacity never can be construed to be acts done by the order of the governor-general, so as to entitle him to plead the general issue. The 24th section of the act recites, that whereas it is reasonable to render the provincial magistrates, as well native as British-born subjects, more safe in the execution of their office, it is enacted that no action for wrong or injury shall lie in the Supreme Court, against any person whatsoever exercising a judicial office in the county courts, for any judgment, decree, or order of the said court, nor against any person for any act done by or in virtue of the order of the said court. Now, in the first place, this clause applies to the orders of the court, and not to the individual acts of the judge; and, in the next place, the judgments, orders, or decrees, intended by the legislature, are such as the judicial officer has authority to exercise, namely, over natives, and not over British subjects, who are not subject or amenable to the jurisdiction of the provincial magistrates. Here the respondent, a Mofussil magistrate, issues a Perwannah for the arrest of the appellant, a British-born subject, without the oath of any party being taken, without any charge made, without any accusation, or even accuser, but solely on his own suspicion, drawn, it may be, from the report of the Darogah, but of which the respondent is in utter ignorance. The Act of 21 Geo. 3, c. 70, was never

intended for such a case as this, nor can it be strained to meet it. If the construction given by the Supreme Court to the 24th section be correct, the appellant will be without redress at law; he cannot sue the respondent in the district in which the acts happened, and the native courts of Sudder and Nizamut are courts of appeal, without original jurisdiction. The consequence will be, that the local magistrates in India will enjoy a protection and immunity not possessed by a judge of the highest court of record in England.

Then it is said that the respondent, being a justice of the peace, had jurisdiction under the 53 Geo. 3, ch. 155, § 105; but that clause applies only to cases of arrest of a party complained of, after the case has been heard and decided, and a fine imposed and not paid, and no property found within the district from which such fine could be levied. The question, then, is, whether the respondent, being, as it is admitted, a justice of the peace, and, as such, amenable to the Supreme Court, can be permitted to say, that the act done by him was in his capacity of judge of the Foujdarry Court, and not as a magistrate, and that, as such judge, he is entitled to plead the general issue, and to the protection of the 21 Geo. 3, ch. 70. We do not contend that an action would lie against the respondent acting within his jurisdiction; the Statute 21 Geo. 3, ch. 70, protects the judges of the native courts in India, in the same manner as those of 7 Jac. 1, ch. 5, 21 Jac. 1, ch. 12, § 15, and 42 Geo. 3, ch. 85, § 6, protect the judges of our own courts; but if the act done be out of the jurisdiction of the judge, then he is not protected. *Bushel's case*, 1 Mod. 119; *Hamond v. Howell*, 1 Mod. 184, and 2 Mod. 218; *Miller v. Seare*, 2 W. Black. 1141. This doctrine was admitted in *Dicas v. Lord Brougham*, 6 Carrington & Payne, 249, and formed the basis of the decision in *Mostyn v. Fabrigas*. If an act is done by a judge as judge of record, in his judicial capacity, then no action will lie against him. *Groenvelt v. Burwell*, 1 Lord Raym. 454; 1 Salk. 200. But the Foujdarry Court is not a court of record; it is the native criminal court, created under the Regulation of 1772, at the same period as the Sudder, which has been held, as we are instructed, by the Supreme Court of Calcutta, not to be a court of record. If a party, not being a judge of a court of record, improperly grants a warrant, on which another is imprisoned, an action lies. *Beardmore v. Carrington*, 2 Wilson, 244; *Burdett v. Abbott*, 14 East, 1; and he must plead specially. Now, though the warrant is sealed with the seal of the Foujdarry Court, the act of granting it was a ministerial and not a judicial act, and, being an excess of jurisdiction, an action will lie for it. *Beaurain v. Scott*, 3 Camp. 388. The distinction between a ministerial and judicial act was taken and insisted on with great learning and ability, in a case in the Court of

Common Pleas in Ireland. *Taaffe v. Downes*, Chief Justice of the King's Bench, 3 Moore, P. C. 36. The plaintiff having been arrested upon a warrant from the chief justice, brought an action of assault and for false imprisonment, to which the defendant pleaded that he was Chief Justice of the King's Bench, and that as such, and in the course of his office of chief justice, issued his warrant. The plaintiff demurred, because the defendant did not justify by his plea the issuing the warrant, by setting forth the causes for which, as well as the authority under which, it was issued. The case was elaborately argued by the most eminent men at the Irish bar, and though the court gave judgment against the demurrer, one of the judges, Mr. Justice Fletcher, being dissentient, yet the distinction between the ministerial and judicial acts of a judge, which formed the ground of his dissent, was not controverted by the other judges, who only held that the act in question was legal and could not be questioned, because it was a judicial act. The chief justice, however, was a judge of record; even, therefore, admitting the case to have decided that a judge could not be questioned for an act ministerial, but in the nature of a judicial act, that decision cannot be relied on here; for there is no pretence for saying that the Foudrarry Court is a court of record, or its judges any thing higher than our justices of the peace. In *Tule v. Chambers*, 3 Nev. & Man. 523, where a magistrate committed a man under the 39 & 40 Geo. 3, ch. 99, § 8, (the Pawnbrokers' Act,) for reëxamination upon a charge of embezzlement, and not of penalty, as provided by the act, the magistrate was held liable to an action for exceeding his jurisdiction. The proceeding of the respondent was an act *in pais*, and not of record, for which he is not amenable if he has exceeded his jurisdiction; this, we maintain, he clearly has done; the judgment, therefore, entered up by the Supreme Court for the respondent on the general issue must be reversed, and the cause remitted back to the court to assess the damages due to the appellant, for the wrong and injury he has sustained.

Mr. Serjeant *Spankie*, Sir *William Follett*, Q. C., and Mr. *Greenwood*, for the respondent. The action of trespass brought against the respondent by the appellant was not sustainable in the Supreme Court, for two reasons: first, because the respondent, acting *bonâ fide* in the execution of his office as magistrate of the Foudrarry Court, in a case within the jurisdiction of that court, is protected by the Statutes 21 Geo. 3, ch. 70, §§ 2, 24, and 53 Geo. 3, ch. 155, § 105; and secondly, because it did not appear upon the trial, nor was there any ground for the court to presume, that the respondent had any notice of the fact, or any reason to suppose that the appel-

lant was not a native, and, as such, amenable to the jurisdiction of the Foujdarry Court. The sections 2 and 24 of the 21 Geo. 3, ch. 70, must be taken together. The latter provides that no action shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country courts, for any judgment, decree, or order of the said court; and, by the former, any person impleaded in the Supreme Court for any act done by order of the governor-general in council, may plead the general issue. Now it is admitted that the parties engaged in the riot were natives, and, as such, amenable to the jurisdiction of the native courts. The appellant was the exception; he, it seems, was an European and a British subject. But how was Mr. Halket to know that circumstance? His name would not necessarily import the fact. He might be half-caste. It is clear that he was engaged with others, who were amenable to the jurisdiction of the Foujdarry Court, in a common breach of the law; when, therefore, he was apprehended, if he intended to avail himself of his privilege as a British subject, he should have moved for a warrant to be discharged. That would have been the course here; and if he had that remedy, can he lay by, and then bring his action? But if a magistrate acts *bonâ fide*, he is protected against all unintentional errors; that is the principle upon which all the acts of parliament for their protection are framed, and the decisions of the courts are in accordance with that principle. *Weller v. Toke*, 9 East, 364; *Beechey v. Sides*, 9 Barn. & Cr. 806; *Price v. Messenger*, 2 Bos. & Pul. 158. The 7 Jac. 1, ch. 5, made perpetual by 21 Jac. 1, ch. 12, first enabled an officer, impleaded for the execution of his office, to plead the general issue. By the 42 Geo. 3, ch. 85, § 6, this provision was extended to all persons having, holding, or exercising public employment in or out of the kingdom, and who, by law, are empowered to commit persons to safe custody; so that, independent of the statute 21 Geo. 3, ch. 70, the respondent, being a person having legal authority to commit, if sued in this court, might have pleaded the general issue. But it is said that this arrest of the appellant was not within the intent or meaning of 21 Geo. 3, ch. 70. The instrument of arrest is a Perwannah, which is something more than a warrant; for it sets forth the report of the Darogah on which it is founded, and then proceeds to order the arrest of the parties implicated in the riot, who are to be detained until the arrival of the presence, that is, the judge, and not brought, as would be the case here, immediately before him for examination. It is an order, and being sealed with the seal of the court, must be taken to be an order of the court, and, as such, is precisely within the 24th section of the Act 21 Geo. 3, ch. 70. Then is Mr. Halket liable to an action of trespass, for excess of jurisdiction in a matter over which he had

already, as respected the natives, jurisdiction, without notice of the appellant's character of a British subject? That is contrary to the principle of all the cases. If a judge having jurisdiction exceed it by mistake, no action can be maintained against him. *Gwynn v. Poole*, Lutch. 937; *Truscott v. Carpenter*, Lord Raym. 229; *Lowther v. Earl of Radnor*, 8 East, 113. In *Dicas v. Lord Brougham* there was no special plea; the plea of the general issue was held sufficient. If there is a general law, as an act of parliament, the court are bound to take notice of it; it need not be pleaded in abatement; that was settled in *Parker v. Elding*, 1 East, 352, and has been followed by *West v. Turner*, 6 Add. & Ell. 614. The effect of reversing the judgment of the Supreme Court would be to allow actions to be brought against individual judges for the acts of the court; that is plainly contrary to every dictum and decision to be found. The judgment, therefore, of the court below must be affirmed, and the appeal dismissed with costs.

Mr. *Hill*, in reply. The construction put upon the 21 Geo. 3, ch. 70, is inconsistent with the provisions of the act itself. It is contended that, by the 24th section, judicial officers are indemnified from any proceedings in respect of acts done by them as such; but the two succeeding sections provide for the case of informations being brought against them for corrupt acts. The argument puts them too high. They may be indicted; is that consistent with their being judges of record, and, as such, protected? The judges of the Court of Record here can only be proceeded against by impeachment; they are amenable to parliament alone for their acts. Are the judges of the Foujdarry Court in India on the same footing? In the 53 Geo. 3, ch. 155, § 105, the local courts are described as established by the East India Company; they are not king's courts, in the sense of the superior courts here; and, if not king's courts, then they have only a local and limited jurisdiction, and their judges must be accountable for any excess in the exercise of it. If a judge acts in a matter or subject in which he has no jurisdiction, he is liable to an action; but if he has jurisdiction, though he proceed erroneously, no action will lie. That was the distinction taken in the *Marshalsea case*, 10 Co. Rep. 69, 76, 2d Res., and by Holt, C. J., in *Groenvell v. Burwell*; by Powell, B., in *Gwynn v. Poole*; and by De Grey, C. J., in *Miller v. Seare*, 2 W. Black. 1145; and was the foundation of the more modern case of *Ackerley v. Parkinson*, 3 Maule & Sel. 411. The argument, that the respondent had jurisdiction over natives, cannot be carried to give him any over British subjects, who are expressly exempted from the operation of the native courts. The arrest of the appellant was not a judicial act or

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founded on any judicial proceeding. The respondent had no right to do more than issue a summons, and immediately he found that the appellant was a British subject, he must have been discharged. He began by exceeding his authority as a magistrate, acting judicially when he ought only to have acted ministerially; and proceeding summarily, when he ought first, at least, to have inquired and ascertained that he had jurisdiction to act at all. He is, therefore, not entitled to any privilege, and ought not to be screened from the consequences of his own deliberate act.

Mr. Baron PARKE. The material question in this case is, whether the defendant, being a judge of the Foujdarry Court of the Zillah of Nuddeah, was, in that character entitled to the protection of the 21 Geo. 3, ch. 70, § 24, for issuing his order, or Perwannah, and for what was done in obedience to it.

This section is as follows: — And whereas it is reasonable to render the provincial magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted, That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country courts, for any judgment, decree, or order of the said court, nor against any person for any act done by or in virtue of the order of the said court."

Three meanings may be attributed to this clause.

1st. It may mean that no action should lie against one exercising a judicial office in the country courts, for any judgment, decree, or order of the court, whether in a matter in which the court had a jurisdiction or not, or whether the judge wilfully and knowingly gave judgment, or made an order, in a matter out of his jurisdiction or not; so that the fact of the existence of a judgment, decree, or order, should preclude all inquiry.

2d. It may mean to protect the judge only where he gives judgment, or makes an order, in the *bona fide* exercise of his office, and under the belief of his having jurisdiction, though he may not have any.

3d. The object may have been to put the judges of the native courts on the footing of judges of the superior courts of record, or courts having similar jurisdiction to the native courts here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction.

It seems to us, that the first of these constructions is inadmissible. It never could have been intended to give such unlimited power to the judges of the native courts; and reason points out that the gen-

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eral words of the clause must be qualified in the manner stated in one of the two latter modes of construction.

We think that the third is the right mode, and that the true meaning of the section in question was to put the judges of the native courts of justice on the same footing as those of English courts of similar jurisdiction. There seems no reason why they should be more or less protected than English judges of general or limited jurisdiction, under the like circumstances. To give them an exemption from liability, when acting *bonâ fide* in cases in which they had, though mistakenly, acted without jurisdiction, would be to place them on a better footing than English judges or magistrates, and to leave the injured individual wholly without civil remedy; for English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

This construction is that contended for by the appellant, and to that extent we think that the appellant is right. But in applying that rule to the facts in evidence in the present case, we think that enough does not appear to make the defendant a trespasser.

We must consider the defendant as being in the same situation as a criminal judge in this country, with the qualification, that he had no jurisdiction over one particular class, namely, the European-born subjects of the British crown; and the question is, whether he is liable to an action of trespass for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

If the particular character of the plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the defendant would have been protected; for it is not merely in respect of acts in court, acts *sedente curiâ*, that an English judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case of *Taafe v. Downes*, 3 Moore, P. C. 36, and an order under the seal of the Foujdarry Court, to bring a native into that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and, whether there was any irregularity or error in it or not, would be punishable by ordinary process at law. But the protection would clearly not extend to a judicial act done wholly without jurisdiction; and it is contended that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the court; and the special jurisdiction given by the

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53 Geo. 3, ch. 155, § 105, did not warrant the mode of proceeding in this case, there being no information or complaint by a native ; nor did that section of the statute authorize imprisonment in the first instance.

But the answer to the objection to the defendant's jurisdiction, founded on the European character of the plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the defendant knew or had such information, as that he ought to have known of that fact ; and it is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus, in the elaborate judgment of Mr. Baron Powell, in *Gwynn v. Poole*, Lutw. App. 1566, it is laid down, that a judge of a court of record in a borough was not responsible as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least, that he might have been cognizant but for his own fault ; which last proposition Mr. Baron Powell illustrates by a reference to the case of the *Marshalsea Court*, which had jurisdiction only in certain cases where the king's servants were parties, who, being all enrolled, the judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron Powell, (speaking of the case of a borough court,) that the cause of action does not arise within the jurisdiction of the court, as it ought to do ; but as the judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case, as in others, "*ignorantia facti excusat.*" Mr. Baron Powell lays down the same rule as to a party ; but his opinion in that respect is disapproved of by Lord Chief Justice Willes, in *Moraria v. Sloper*, Willes, 35, but not so far as it relates to a judge or officer.

The like rule has been followed in the case of magistrates acting under the special powers of acts of parliament, who are not liable as trespassers, if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other, to show their want of jurisdiction. *Pike v. Carter*, 3 Bingham, 78 ; *Lowther v. Earl of Radnor*, 8 East, 113. It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect ; and it lies on the plaintiff, in every such case, to prove that fact.

In the case now under consideration, it does not appear from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had

such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the plaintiff, does not arise; and it is unnecessary to determine whether, if distinct notice had been given by the plaintiff to the defendant, or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a judge of record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction.

The only doubt their lordships have had in the consideration of this case is, whether the evidence was sufficient to show that the defendant knew or ought to have known that the plaintiff was a British-born subject. They have had none, that it was competent for the defendant to give his defence in evidence under the general issue, by force of the statute 42 Geo. 3, ch. 85, § 6, if not at common law.¹

"The principle at law," said Fox, J., in *Taafe v. Downes*, 3 Moore, P. C. 51, "of exemption from being sued for matters done by judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice, that the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely; it is calculated for the benefit of the people, by ensuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land, and the dispensation of justice in this country; and is founded on the very frame of the Constitution; it is to be met with in the earliest books of law; and has been continued down to the present time, without one authority or dictum to the contrary, that I have been enabled to find. . . .

I think myself called upon, in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner, as may be requisite to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect; not to injure or infringe. It appears to be most necessary that a judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution; — they are only answerable for their judicial conduct in the high Court of Parliament; and without the existence of this principle, it is utterly impossible that there could be such a dispensation of justice, as would have the effect of protecting the lives or property of the subject. A judge must — a judge ought to be uninfluenced by any personal consideration whatsoever operating upon his

¹ See also the case of *Miller v. Hope*, 2 Shaw, App. Cas. 125, where it was held by the House of Lords, (affirming the judgment of the Court of Session in Scotland,) that an action of damages is not competent against a supreme judge, for a censure passed by him, while acting in his judicial capacity, on a counsel practising at the bar, and engaged in the cause then before the court, although it was alleged that the censure had been made injuriously, and from motives of private malice.

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mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the judges,—an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject."

This freedom from action and question at the suit of an individual, it has likewise been observed, is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be; and it is not to be supposed beforehand, that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct. Per Lord Tenterden, C. J., in *Garnett v. Ferrand*, 6 Barnewall & Cresswell, 625, 626.

Judges and magistrates are responsible to the government from which they derive their authority, but not to individuals, for

the negligent performance or wilful violation of official duty. They are liable to impeachment for corruption or other misconduct; but are exempt from answering in private actions for acts done in the course of the administration of justice, where they have jurisdiction of the cause, and of the party to be affected by the decision. Per Merrick, J., in *Wells v. Stevens*, 2 Gray, 119. And see per Shaw, C. J., in *Pratt v. Gardner*, 2 Cushing, 68-70.

An action, or an indictment, then, does not lie against magistrates and persons having a limited authority, acting judicially in a matter within the scope of their jurisdiction, however erroneous their decisions, or corrupt and malicious their motives.¹ *Yates v. Lansing*, 5 Johnson, 282; 9 Johnson, 395; *Cunningham v. Bucklin*, 8 Cowen, 178; *Briggs v. Wardwell*, 10 Massachusetts, 358, Rand's note; *Taaffe v. Downes*, 3 Moore, P. C. 36; *Doswell v. Impey*, 1 Barnewell & Cresswell, 169, 170; *Phelps v. Sill*, 1 Day, 315, 329.

This rule has been illustrated in a variety of cases. Thus, an action does not lie against a justice of the peace, for an error of judgment in taking a recognizance to prosecute an appeal in a form not authorized by law, and therefore invalid, *Chickering v. Robinson*, 3 Cushing, 543; nor for demanding excessive bail, *Evans v. Foster*, 1 New Hampshire, 374; nor for putting the defendant on trial, in a criminal case, without allowing him an opportunity to obtain witnesses and proofs favorable to him, and also to obtain counsel to advise and assist him. *Pratt v. Gardner*, 2 Cushing, 63. The principle upon which these and similar cases turn is very simple; the difficulty is always found in applying it.

But, on the other hand, justices of the peace have always been held responsible

¹ In *Gregory v. Brown*, 4 Bibb, 28, Boyle, C. J., said: "Where a magistrate acts judicially upon a subject within his jurisdiction, though he should act illegally or erroneously, he cannot be made liable for any damage sustained by his conduct, unless he has acted from impure or corrupt motives." In South Carolina, a justice may be indicted for corrupt or oppressive conduct. *The State v. Johnson*, 2 Bay, 385; *Lining v. Bentham*, 2 Bay, 1. See *Brodie v. Rutledge*, 2 Bay, 69.

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to individuals, in civil suits, for all the injurious consequences arising from every illegal act they may have done, either in the adjudication of causes of which they had no jurisdiction, or in the exercise of their ministerial powers, or in the discharge of their ministerial duties. Thus, if a justice of the peace renders judgment and issues execution after his jurisdiction has ceased, he is liable for an arrest made by virtue of such execution. *Spencer v. Perry*, 17 Maine, 413. See *Dyer v. Smith*, 12 Connecticut, 384. So if he issues a warrant against a person, as the father of a bastard child, no complaint having been made to authorize it. *Poult v. Slocum*, 5 Blackford, 421. And a justice of the peace, who issues an execution, containing a command to arrest the body of the judgment debtor, and an attorney who procures such execution to be issued, and causes the debtor to be arrested thereon, in a case in which both know that the law prohibits such arrest or the issuing of such an execution, are jointly liable to the debtor in trespass. *Sullivan v. Jones*, 2 Gray, 570. Merrick, J., said: "When, in the progress of a suit, a final judgment has been rendered, there can remain no further judicial duty to be performed. The court or magistrate has then no longer a question upon which to deliberate, or a cause between contending parties to decide. Nothing is left to be done but to carry the judgment into effect. That, under our law, is accomplished by means of an execution. It was early determined by this court that the issuing of such execution by a justice of the peace was merely a ministerial act; and in a particular instance, where such process was issued erroneously, the magistrate was held responsible in damages for the commitment to prison of a party under it. *Briggs v. Wardwell*, 10 Massachusetts, 356. This decision has never been brought into question; but, ever since it was made, has been acquiesced in and respected. *Blanchard v. Waters*, 10 Metcalf, 185. The case of *Kendall v. Powers*, 4 Metcalf, 553, may be cited as an instance in which the doctrine laid down in *Briggs v. Wardwell*, that a magistrate is liable to a party in a

civil action for damages resulting to him from the illegal issuing of a final process upon a judgment rendered, was considered, both by the counsel of the parties, and by the court, so familiarly and firmly established, that it was not even adverted to as presenting any possible question for inquiry or debate."

In Massachusetts, in a very recent case, it was held that the power of justices of the peace to punish for contempt persons duly summoned to testify before them, who fail or neglect to appear, without reasonable cause, is only incidental and auxiliary to the trial of the cause in which the witnesses were summoned, and cannot be legally exercised, except during the pendency of such cause; that after its final disposition by a judgment, the authority to punish such contempt ceases. *Clarke v. May*, 2 Gray, 410. In this case the defendant, a justice of the peace proceeded to punish contempt of this kind by a separate and independent proceeding. He was held to be guilty of an excess of jurisdiction, which rendered him liable as a trespasser to the party injured. And see *The State v. Applegate*, 2 McCord, 110; *Lining v. Bentham*, 2 Bay, 1; *The State v. Johnson*, 2 Bay, 385; *Richmond v. Dayton*, 10 Johnson, 393.

There is an important qualification to the rule under consideration, which is clearly and accurately stated in the text, by Mr. Baron Parke, and by Mr. Justice Bigelow in the recent case of *Clarke v. May*, 2 Gray, 410, 412; "That judges and magistrates cannot be held liable in trespass for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the judge or magistrate had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the judge or magistrate, in order to hold him liable for acts done without jurisdiction. Otherwise the maxim *Ignorantia facti excusat* applies." In

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Clarke v. May, ubi supra, this qualification was applied to the case of a justice of the peace, who, after finally disposing of a cause tried before him, committed a witness to prison for contempt at the trial. It was held, that he was liable to an action by the witness, as he was cognizant of all the facts which constituted the defect of jurisdiction in the proceedings against the witness. And see *Pike v. Carter*, 3 Bingham, 78; 10 Moore, 876; *Lowther v. Earl of Radnor*, 8 East, 113; *Baylis v. Strickland*, 1 Scott, N. R. 540; *Fernley v. Worthington*, 1 Scott, N. R. 432.

No action lies, although the magistrate was not duly qualified to act. *The Margate Pier Company v. Hannam*, 3 Barnewall & Alderson, 266, (1819.) Although this decision turned upon the construction of a statute, still the reasoning of the court gives it a general importance, and an application to a large class of cases. Abbott, C. J., delivered the judgment of the court. The question arises in this manner: "By an act of 51 Geo. 3, ch. 36, his majesty is authorized to issue a commission, to be directed to certain persons to be therein named, constituting them to be justices of the peace within and throughout the liberties of the cinque ports, and investing them with the same power and authority as belongs to any mayor, bailiff, or jurat, to exercise within the liberties of the town whereof he is mayor, bailiff, or jurat, 'And from and after,' (these are the words of the statute,) 'such commission or commissions shall have so issued, all persons, and every person named in any such commission or commissions, shall be and they and each of them is and are hereby declared to be justices and a justice of the peace within and throughout the liberties of the cinque ports, and invested with the same power and authority within and throughout the same,' as belongs to any mayor, bailiff, or jurat within his port or town. By the third section of this act it is provided and enacted, 'That no person or persons to be named in such commission shall be thereby, or by this act, authorized to act as a justice of the peace, unless he shall have such qualification as will authorize him to act for a county, and

unless he shall have taken and subscribed the oaths, and delivered in at some general sessions to be holden in some one of the cinque ports, the certificate respectively required to be taken and subscribed and delivered in by persons qualifying themselves to act for counties.' The defendant, Dyson, had taken the oaths under a writ of *dedimus potestatem*, but he had omitted to deliver a certificate, or take any oath at any general sessions in any one of the cinque ports; and upon this omission the objection to the validity of his acts as a justice was grounded.

"We are of opinion, that, notwithstanding this omission, his acts as a justice, in the matters in question, were valid. An objection of the same nature may happen to arise in some cases of persons acting as justices for counties at large; and this gives a general importance to the question. By the stat. 18 Geo. 2, ch. 20, it is enacted, 'That no person shall be capable of being a justice, or acting as such for any county, without the qualification by estate therein mentioned, and who shall not take, at some general or quarter sessions, the oath therein prescribed.' And by the second section, 'Any person who shall act as a justice without having taken the oath, or without being qualified, shall forfeit £100.' It is obvious that if the act of the justice, issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority: a constable who arrests, and a gaoler who receives a felon, will each be a trespasser; resistance to them will be lawful; every thing done by either of them will be unlawful; and a constable, or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction. 'Acts of parliament,' says Lord Coke, 'are to be so construed, as no man that is

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innocent, or free from injury or wrong, be by a literal construction punished or endamaged.' We think these acts do most reasonably admit of another construction. We think the *restraining* clauses are only prohibitory upon the justice. By the particular act upon which this question has arisen, Mr. Dyson, having been named in the commission, is declared to be a justice, and invested with power and authority as such. The proper effect, therefore, as it seems to us, of the third section, is only to make it unlawful in him to act as such; but not to make his acts invalid. Many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The interest of the public at large requires that the acts done should be sustained; sufficient effect is given to the statutes by considering them as penal upon the party acting. No pecuniary penalty, indeed, is imposed by the stat. 51 Geo. 3; but a justice acting contrary to its prohibitory clause will subject himself, if not to the penalty of the 18 Geo. 2, yet certainly to a prosecution by indictment."

It is the duty of every justice of the peace to insert in the record of each cause before him a full narrative of every thing which is necessary to exhibit its progress, and the final determination of it so far as he has had any official connection with it. A record, so made, is conclusive evidence for and against them. In *Basten v. Carew*, 3 Barnewall & Cresswell, 652, 653; 5 Dowling & Ryland, 566, the principle was thus stated by Abbott, C. J.: "It is a general rule and principle of law, that where justices of the peace have an authority given to them by an act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required to do in order to originate their jurisdiction, a conviction drawn up in due form,

and remaining in force, is a protection in any action brought against them for the act so done." "No principle is more firmly established," said Merrick, J., in *Wells v. Stevens*, 2 Gray, 117, "than that which excludes oral testimony when offered to vary or contradict written judicial records. The record of a court of competent jurisdiction imports incontrovertible verity, as to all the proceedings which it sets forth as having taken place, and is of so high a nature that no averment can be made against it. It is necessarily a written memorial, and cannot exist partly in writing and partly in parol. The evidence afforded by it has the same force and efficacy in criminal, as in civil cases; and in the former is conclusive proof of the fact of conviction, and of the judgment, and as to all legal consequences resulting from it. *Comyns's Dig. Record, E.*; *Ramsbottom v. Buckhurst*, 2 Maule & Selwyn, 565; *Sayles v. Briggs*, 4 Metcalf, 421.

"The records of justices of the peace and of police courts, made in the performance of official duty, and in obedience to a positive direction of the statute, are evidence, as to the conduct and disposition of each particular cause of which they have taken cognizance, of as full and conclusive a character as those kept by courts of larger and more general jurisdiction. This was so declared and the rule enforced by this court in the case of *Sayles v. Briggs*, 4 Metcalf, 421. Upon the trial of that action, parol evidence was resorted to and received to show the existence of material facts not mentioned in the record of a magistrate, which one of the parties produced and used as an instrument of proof. It was afterwards determined that the parol evidence should have been rejected; and because it had been admitted, the verdict which had been returned was set aside, and a new trial [granted. So also in the case of *Kendall v. Powers*, 4 Metcalf, 553, the facts disclosed, and the questions arising upon them, were very similar to those presented in this case; the only essential difference between them being that there it was the magistrate, and not

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as here, the convicted party, who sought to bring in extrinsic evidence to establish a fact not stated in the record. It appeared from the record which was produced and read, that after he was convicted, Kendall appealed from the judgment and sentence awarded against him. Powers then offered to show that the appeal was subsequently waived and voluntarily withdrawn; but it was held that the record was conclusive, and the evidence inadmissible.

"It has been argued, in behalf of the plaintiff, that the evidence offered by him should have been received, because otherwise he can obtain no redress for the loss of the right of which he complains that he has been unjustly deprived; and also because a magistrate ought not to be allowed to shield himself from responsibility for an act of wrong or oppression by an additional violation of duty in neglecting or wilfully refusing truly to record the proceedings of a case tried before him. But the rejection of such evidence is an obvious and inevitable consequence of the incontrovertible verity which the law, for reasons, lying as it has been said at the foundation of all well-ordered jurisprudence, attaches to judicial records."¹ See also *Mather v. Hood*, 8 Johnson, 44; *Bigelow v. Stearns*, 19 Johnson, 39; *Cunningham v. Bucklin*, 8 Cowen, 178.

In *Brittain v. Kinnaird*, 1 Broderip & Bingham, 432; 4 Moore, 50; it was held, that where a magistrate has jurisdiction, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts stated in it, in an action against him. This was an action of trespass for seizing and taking possession of a certain vessel, and detaining the same. It appeared that the vessel in question, which was decked, and of the burden of thirteen tons, was seized by the defendants, as magistrates, under the Bum-boat Act. The plaintiff was about to offer evidence, that the vessel in question was not a boat within

the meaning of the act, when it was objected by the counsel for the defendants, that the conviction was the only admissible evidence of what the magistrates had determined, and was conclusive as to the subject-matter of that determination. The court coinciding in that opinion, the conviction was put in, and appeared to be a conviction, for that the plaintiff unlawfully had in his possession in a certain boat, certain stores, etc. The following is the admirable judgment of Richardson, J.: "Whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming, that the fact, which the magistrate has to decide, is that which constitutes his jurisdiction. If a fact decided as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case of a conviction under the game laws for having partridges in possession; could the magistrate in an action of trespass be called on to show that the bird in question was really a partridge? and yet it might as well be urged in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case, that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present, we are not to look to the inconvenience, but the law; but, surely, if the magistrate acts *boné fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the

¹ In North Carolina, a justice has been held liable to an action for maliciously and unjustly refusing to grant an appeal from his own judgment. *Hardison v. Johnson*, Cameron & Norwood, 454.

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magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged."

In *Cave v. Mountain*, 1 Manning & Granger, 257, 261, the following rule was laid down, which the Court of Queen's Bench, in *Regina v. Bolton*, 1 Queen's Bench Rep. 74, 75, characterize as clear and satisfactory. "If," said Tindal, C.J., "a magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation."

But where a magistrate committed a defendant for an alleged offence against one statute, and afterwards drew up a conviction for a different offence from that stated in the commitment, it was held that the conviction was no justification of the magistrate, in an action against him for false imprisonment. *Rogers v. Jones*, 3 Barnewall & Cresswell, 409; 5 Dowling & Ryland, 268. Per Curiam: "The commitment and conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and different offence. Here, the plaintiff has been imprisoned under a commitment for disobedience to an order of a magistrate, by which he was directed to pay 11s., as a recompense to the owner of the wood

taken, and £20 to the overseers of the poor of the parish. It is difficult to say that that order and commitment are founded on any statute. It would appear that the magistrate intended to proceed on the 15 Car. 2, ch. 2, but the punishment is not warranted. The conviction upon which the magistrate relies, as a justification for this imprisonment, is founded on the 6 Geo. 3, ch. 48, by which it is made an offence, wrongfully and maliciously to cut down trees without the consent of the owner. That conviction would have been an answer to an action for a commitment, in respect of the offence mentioned in it; but it is no justification of imprisonment for any other offence."

In *Daniell v. Phillipps*, 1 Crompton, Meeson & Roscoe, 662; 5 Tyrwhitt, 292; it was objected, that the conviction did not support the commitment, for the former was for an injury to personal, the latter to real property. But per Parke, B., this objection ought not to prevail, because the commitment charges that the conviction is for the same offence, though in somewhat different language; and it proceeds upon the same statute as that on which the commitment is founded; in which respect this case is distinguishable from that of *Rogers v. Jones*, *ubi supra*, where the commitment and conviction were for offences against different statutes. In *Tarry v. Newman*, 15 Meeson & Welsby, 656, the same learned judge said that *Daniell v. Phillipps* is in point to show that the commitment must be read with the conviction, and construed in the same way.

H.

Libel — Proof of Publication.

REX v. JOHNSON.¹

November 23, 1805.

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The publisher of a public Register receives an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the Register; after which he receives two letters in the same handwriting, directed as mentioned, and having the Irish postmark on the envelopes; which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed; this is a sufficient ground for the court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the Register in Middlesex for the purpose of publication, the whole is evidence sufficient for the jury to find a *publication* by the procurement of the defendant in Middlesex.

THE plea of the defendant, one of the judges of the Court of Common Pleas in Ireland, to the jurisdiction of this court, having been overruled,² he pleaded not guilty to the indictment found by the grand jury of the county of Middlesex; which charged him with the publication in that county of certain libels upon the administration of government in Ireland, and amongst others upon the Lord Lieutenant and Lord High Chancellor of Ireland; and the trial was had on this day at the bar of the court by a jury of the county of Middlesex. In the course of the trial, the publication of the libels having been proved to be made in that county, by insertion of them in Mr. Cobbett's *Weekly Register*, which was printed and published in Westminster, the following evidence was given on the part of the crown to show that such publication was made by the procurement of the defendant. Mr. Cobbett, the publisher of the Register, proved that before the publication of the libels in his paper he had received an anonymous letter (the original of which he believed to be destroyed) *in the same handwriting* as the libels which he afterwards received; in which letter (parol evidence of which was admitted, after objection taken and overruled, to be given for this purpose) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication in his Register certain information of public affairs in Ireland; and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt

¹ 7 East, 65.

² Vide this case, upon demurrer to a plea to the jurisdiction of the court, 6 East, 583-602.

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of this letter, which was published in the Register, Mr. Cobbett, through the medium of the same Register, requested the promised information to be directed to Mr. Budd, No. 100, Pall Mall, whose shop was at that time used by Mr. Cobbett for the publication of his Register, where letters of communication were addressed to him, and from whence he received them; his own house being in Duke street, Westminster. After this intimation, Mr. Cobbett received in due time two several letters, containing different parts of the libels in question, both in the same handwriting with the letter previously received. Both the letters came under cover, but the covers were believed to be either destroyed or lost, having been thrown aside as useless; and therefore parol evidence was admitted to prove that they had the Irish postmark upon them, and were directed in the manner pointed out in the Register. The first of the letters, dated 29th of October, 1803, was received and the cover opened by Mr. Budd, who thereupon sent it, together with the cover opened, to Mr. Cobbett, in Duke street, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbett received the next letter, which came to Mr. Budd by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. Cobbett, swore to their belief of their being the handwriting of the defendant, who at the period in question was an Irish judge. It was then proposed by the attorney-general that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. Cobbett for the purpose of being published in his Register. But previous to their being read,

Adam, Park, Lockhart, and Richardson, objected to the reading of the libels, upon the ground that there was no evidence to go to the jury of a publication by the defendant in Middlesex. Admitting, for the sake of argument, that the letters were in the handwriting of the defendant, there was no evidence that he had sent them into Middlesex to be there published; nor any privity established between him and Cobbett the publisher. It was not proved that the envelopes were in the defendant's handwriting; but papers written by him and not intended for publication might have fallen into the hands of another, who transmitted them to Cobbett. The mere circumstance of the envelopes having the Irish postmark upon them could not connect them with the defendant; who was not even proved to have been in Ireland at the time. Neither did it appear that the first letter, which was opened by Budd, who was not called

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as a witness, was really contained in the envelope which was sent opened with it. The second letter was indeed connected with the envelope, but there was no evidence that either of the papers was received from the post-office, which might have been ascertained by persons employed in that office. If it were urged that the papers themselves contained internal evidence that they were intended for publication, the same might have been urged in the case of the Seven Bishops, where there was clear proof of a publication in Middlesex; for the petition which had been prepared and signed by them at Lambeth in the county of Surry, was found in the king's hands in Middlesex, and was addressed to him; 4 State Trials, 337; and the only link wanted was, that it came there by the agency of the bishops; Ibid. 344, 345; which was holden not to be supplied by the evidence of their acknowledgment of their handwriting in that county; Ibid. 345-349, 360-365; in consequence of which Lord Sunderland was afterwards called to prove the delivery of it by the bishops to the king in Middlesex.

The *Attorney-General*, *Solicitor-General*, *Erskine*, *Garrow*, *Wood*, and *Abbott*, for the crown, were stopped by the court.

LORD ELLENBOROUGH, C. J. Nothing which falls from the court will overrule or tend to shake that which was soundly ruled in the case of the Seven Bishops, where the only evidence at first relied on was of a confession by the defendants, extorted as it was, of their having owned in Middlesex their signatures to the petition which had been prepared and signed in the county of Surry; but there was no evidence of any publication of the libel, as it was then called (though it was nothing more than a decent and humble petition of those reverend persons to the king,) in the county of Middlesex, until Lord Sunderland was called, who gave evidence of a publication of the paper in that county proper to be left to the jury. But here there is no question of the fact of publication by Mr. Cobbett in Middlesex of that which is admitted to be a libel; and the only question is, Whether the defendant were accessory to that publication? For if he were, the offence is established. For one who procures another to publish a libel is, no doubt, guilty of the publication, in whatever county it is in fact published in consequence of his procurement. Now material evidence of the fact of such procurement may be collected from the papers themselves, as they have been opened by Mr. Attorney-General, which papers, as the proof at present stands, are in the handwriting of the defendant; and are said to answer the description of those which Cobbett had been previously desired to

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publish, and which papers came to his hands through the medium pointed out by him in his Register. How then can we be called upon to pronounce that there is no evidence to go to the jury of such procurement before we have heard read the papers themselves? I am therefore of opinion that we are bound in duty to receive the evidence.

GROSE, J., concurred in the same opinion.

LAWRENCE, J. The case of the Seven Bishops does not apply to the present. Before Lord Sunderland was called, the only evidence against the defendants was of a confession by them in Middlesex of their handwriting to a paper which was shown them, which was stated to have been written in Surry; but that was no evidence of a publication by them in Middlesex. But here there is clear proof of a publication in Middlesex by Cobbett, and the only question is, Whether this were done by the procurement of the defendant? Then after it has been proved by the witness that he received a notification by letter that he should have papers of a certain description sent to him to publish, if he would undertake to publish them, to which he had given a public answer in his Register in the affirmative, directing to whom the papers should be sent; and when afterwards, in consequence of that communication, he receives papers through the channel pointed out by him, papers which are proved to be in the handwriting of the defendant, (as it stands at present,) and answering, as they are said to do, the description of those before notified to him as intended for publication, must not the papers themselves be read? and is there not evidence to go to the jury for them to decide whether the papers were sent by the defendant, or by some other person?

LE BLANC, J., delivered his opinion to the same effect; and added, in answer to the objection that there was not strict evidence of a delivery of the letters by the post to Mr. Cobbett, that it was not material for the decision of the present question, how the letters came to Mr. Cobbett, whether by the post or a private hand; that was matter of observation to make to the jury.

The libels were then read at length, and in addition to the libellous matter charged, contained various expressions declarative of the author's intention to have them published in the Register; and the latter paper contained an acknowledgment of the publication of the former part of the correspondence.

The defendant afterwards called witnesses to disprove the hand-

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writing, and went to the jury upon the fact that the libels were not in his handwriting; but after a trial of some length, the jury found a general verdict of guilty.

"It is remarkable," say the English Criminal Law Commissioners, in their Sixth Report, p. 61, "that the question whether the mere composing and writing a libel be sufficient to constitute a crime, without any actual publication, does not appear to have ever been completely settled. It was one much discussed in *Sir Francis Burdett's case*, 4 Barnewall & Alderson, 95, but as there had in that case been a publication, although some doubt existed whether it could be regarded as a publication within the county in which the offence was alleged to have been committed, the abstract question whether the mere act of composing and writing a libel, without any publication, was not decided.¹ After having investigated the subject with great attention, we have not been able to attain to the conclusion that the offence was ever deemed to be complete at common law without some publication. The law of libel, as received in the ordinary criminal courts, was undoubtedly an emanation from the Court of Star Chamber. The doctrine of the Star Chamber was borrowed from the Imperial Law of Rome, concerning the *libellus famosus*, to which the libel of the English law was supposed to bear a close resemblance. After having diligently examined these sources, as well as the modern decisions said to be founded upon them, we have not discovered any authority which we have deemed sufficient to warrant us in including this offence in the digest. It will be seen from our digest that even the statute law is not uniform on this point. Some offences are made to consist simply in composing and writing, or printing; whilst in others, publication is essential to the crime."

But notwithstanding a libel may be

written with a real intent to publish it, says Deacon, yet if no publication of it ever takes place, the question seems to admit of no doubt. For whatever a man's intent may be, if such intent is followed by no overt act to accomplish his purpose, it would be difficult to say, that he is deprived of all *locus pœnitentiæ*, and may be indicted for what he only intended, but never in fact attempted. The writing and composing a libel, without any thing further done, may be considered merely as the private registering of a man's own thoughts; and as it is the publication that is the gist of the offence, it seems reasonable, at all events, to require some evidence of an actual attempt to publish, before a party can be charged with an intent to do so. 2 Deacon, *Crim. Law*, 809. And see *Rex v. Paine*, 5 Modern, 163, 167; *Weir v. Hoss*, 6 Alabama, 881.

The publication of a libel is not confined to the actual communication of its contents by the publisher to some other person; for though, in common parlance, the word "publication" may be confined in its interpretation to making the contents known to the public, yet its meaning is not so limited in law; wherein some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will, and of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. So in the case of a libel, the publication of it may be *traditione*, when it is delivered over to scandalize any party; and the publication of it is nothing more

¹ Mr. Justice Holroyd expressed an opinion upon the abstract proposition in the affirmative.

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than doing the last act for the accomplishment of the mischief intended by it. For the moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him, whether it hits the mark or not. There is an end then of the *locus pœnitentiæ*, his offence is complete, the mischievous intention is consummated, and from that moment he is liable to be called upon to answer for his act. And though the act of publication may be proved by an actual communication of the contents of the libel, as by singing or reading, or an open exposure of it to other persons, yet these are not the only nor the usual modes of proof. The usual mode is by delivery of the libel, either by way of sale, or otherwise; and upon proof of the purchase of a pamphlet in Fleet street, it is not necessary to prove that the purchaser read the pamphlet either in London, or elsewhere. Per Best, J., and Abbott, C. J., in *Rez v. Burdett*, 4 Barnewall & Alderson, 126, 160; 2 Deacon, Crim. Law, 808. And see *Scindell v. The State*, 2 Yerger, 581.

A person, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery; and its legal character is not altered, either by the procurement of that person, or by the subsequent handing over of the writing to him. *Brunswick v. Harmer*, 14 Queen's Bench Rep. 185. But the reading a libel in the presence of another, without any previous knowledge of its being a libel, does not amount to a publication. "Also it hath been holden," says Hawkins, "that he who repeats part of a libel in merriment without malice, and with no purpose of defamation, is in no way punishable; but it seemeth that the reasonableness of this opinion may justly be questioned; for

jests of this kind are not to be endured and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it." 1 Hawkins, P. C. ch. 73, § 14. Yet, where a man went to the defendant's house, and requested liberty to see a caricature print, and the defendant thereupon produced it, and pointed out the figures of the persons it ridiculed, Lord Ellenborough ruled that this was not sufficient evidence of a publication. *Smith v. Wood*, 3 Campbell, 323.

Evidence that the defendant communicated verbally to another the defamatory matter, with a view to its publication, is sufficient to charge him with the publication. In *Adams v. Kelly, Ryan & Moody*, N. P. C. 157, a witness (at that time a reporter for the *Observer* newspaper,) stated that he had met with the defendant, who communicated to him the slanderous matter set forth in the first count relating to the plaintiff, which the defendant said would make a good case for the newspaper. The reporter desirous of obtaining information for his paper, attended the defendant to an adjoining tavern, and who gave him a more detailed account, for the express purpose of inserting it in the paper with which the reporter was connected. Afterwards, from the particulars communicated by the defendant, the reporter drew up an account which he left at the office of the *Observer*, to be inserted in that paper. An *Observer* newspaper was then put into the witness's hands, and he stated that a paragraph in that paper contained exactly the same account which he sent to the editor, with the exception of some slight alterations, not affecting the sense, made by the editor. The counsel for the plaintiff then proposed to read the newspaper.

Abbott, Ld. C. J. This newspaper is proposed to be given in evidence, in order to sustain that count, which charges the defendant with publishing the printed libel set forth in the declaration. The evidence is, that the reporter put something in writing from his conversation with the defendant, and which he gave to the editor. What the reporter published

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in consequence of what passed with the defendant, may be considered as published by the defendant; but you must show that what was published is that which was given to the editor by the reporter, which you can only do by producing the paper itself.

It seems that there may be a *constructive* publication. In *Watts v. Fraser*, 7 Carrington & Payne, 369, it was held, that the printer and editor of a magazine are both liable for a libellous lithographic print which is contained in the work, although the print was not struck off by the printer, provided that the print is referred to in the letter-press of one of the articles.

The mere act of *printing* is not sufficient evidence of publication. In *Watts v. Fraser*, 7 Adolphus & Ellis, 223, 233, Lord Denman, C. J., in delivering the opinion, said: "One authority, *Baldwin v. Elphinston*, 2 Wm. Blackstone, 1037, was cited, where the Court of Exchequer held, that printing must *primâ facie*, be understood to be a publishing, because the matter must be delivered to a compositor and other workmen; but it does not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workmen. We cannot, therefore, act upon that case." If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is sufficient evidence to go to a jury that it was published by the defendant, although there be no evidence to show that the printing and publishing were by his direction. *Regina v. Lovett*, 9 Carrington & Payne, 462; *Lamb's case*, 9 Co. Rep. 59. "For when a libel is produced written by a man's own hand," said Lord Holt, "and the author of it is not known; he is taken in the mainer, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him." *Rex v. Beare*, 1 Lord Raymond, 417; 2 Salkeld, 419. But it is not a publication, if the author takes a copy of the libel, provided he never publishes the copy. *Lamb's case*, 9 Co. Rep. 59.

If the libel is contained in a letter ad-

dressed to the prosecutor, this is evidence of a publication sufficient to support an indictment, on the first and general principle of preserving orderly and decent conduct in society, that is, technically speaking, for the preventing breaches of the peace. Therefore the indictment must allege that the intention of sending the letter was to provoke the prosecutor, and to excite him to break the peace. *Rex v. Wegener*, 2 Starkie, Rep. 245; *Hodges v. The State*, 5 Humphreys, 112; 1 Hawkins, P. C. ch. 73, § 11. And where a letter containing a libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties. *Rex v. Wegener*, ubi supra, per Abbott, J. In *Avery v. The State*, 7 Connecticut, 266, the information charged that the defendant sent a letter to the wife of another man, stating that she had acted libidiously with him, and had invited him to an adulterous intercourse and connection with her, and sought opportunities to effect it, and that the defendant wrote the letter and sent it to her, with intent to insult and abuse her, and to seduce and debauch her affections from her husband, entice her to commit adultery, and bring her into hatred and contempt. It was held, that the sending of such a letter, without other publication, was sufficient to support the information, on the general principle, that it tended to cause a disturbance of the public peace.

A sealed letter or other communication delivered to a wife, is a publication within the meaning of the law. A libel respecting a husband published abroad, may never reach the ears or eyes of his wife. But such a communication made directly to the wife is an attempt to poison the fountains of domestic peace at their very sources. *Schenck v. Schenck*, Spencer, 208; *Wenman v. Ash*, 13 Common Bench Rep. 836; 22 Eng. Law and Eq. Rep. 509.

The date of a letter is *primâ facie* evidence that it was written at the place where it was dated. *Rex v. Hensey*, 1 Burrow, 644; *Rex v. Burdett*, 4 Barnwall & Alderson, 95; and the postmark is *primâ facie* evidence that the letter was

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in the office at the time and place therein specified. *Fletcher v. Braddyll*, 3 Starkie, Rep. 64; and if a letter properly directed is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed. Thus if a letter, containing a libel, is produced at the trial with a postmark upon it, and with the seal broken, this is sufficient *prima facie* evidence of a publication to the party to whom it is addressed. *Warren v. Warren*, 1 Crompton, Meeson & Roscoe, 250; 4 Tyrwhitt, 850; approved in *Shipley v. Todhunter*, 7 Carrington & Payne, 680, 686. In *Callan v. Gaylord*, 3 Watts, 321, it was held, that the depositing a libellous letter in the post-office, where it was mailed and despatched, together with its production, with the postmark upon it, by the plaintiff, at the trial, is sufficient evidence of its publication. Gibson, C. J., in delivering the opinion of the court, said: "The fact that the letter was put into the post-office raised a natural presumption, founded in common experience, that it reached its designation by the regular operations of the mail. . . . The depositing of the letter in the post-office would be a publication of it, though it never came to the hands of him for whom it was intended, if it came to those of any one else, because a wrongdoer is answerable for all the consequences of his acts. It was proved to have been put into the post-office by some one; and that it was taken out by some one, is shown by the production of it at the trial; it consequently owes its publicity to the writer."

If the libel be published in a newspaper, proof that copies were distributed, and that the clerk of the printer received payment for them, is evidence of publication. *Respublica v. Davis*, 3 Yeates, 128. And the delivery of a copy to the officer at the stamp-office, *Rex v. Amphitt*, 4 Barnewall & Cresswell, 35; and payment to him for the duties on advertisements in the paper in question, *Cook v. Ward*, 6 Bingham, 409; have each been held evidence of publication. Where a witness testified

that he was a printer, and had been in the office of the defendant where the paper in question was printed, and he saw it printed there, and the paper produced was, he believed, printed with the types used in the defendant's office; this was held to be *prima facie* proof of publication by the defendant. *Southwick v. Stevens*, 10 Johnson, 443.

In *Gathercole v. Miall*, 15 Meeson & Welsby, 319, the question, what is sufficient evidence to go to a jury of a publication of a newspaper was discussed as follows, by Alderson, B.: "The question is, whether or not there is reasonable evidence that this is a copy of the individual paper which has been produced, and which has been shown to have been published by the defendant. Now we must consider what the nature of the instrument is. It is a copy of a newspaper. We must use our own common sense, and remember that, with respect to newspapers, not one copy, but a great variety of copies, are published for general circulation among the public at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials, and from the same type. Suppose I were to have a copy of Meeson & Welsby's Reports here, and Meeson & Welsby's Reports in the Queen's Bench, and Meeson & Welsby's Reports in the Common Pleas, and I were to examine those three books, and to find that there was a misprint in the first page, and a misprint in the fortieth page, and a misprint in the sixty-third page, I should say a jury might very reasonably infer that those three books were printed from the same types. So I say here with respect to a newspaper; if you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced; and if so, it is printed by the defendant; and if so, the defendant is responsible for the extent of the injury which may be done by that paper, which by some means has come out of his possession, and which the jury may infer that

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he, or somebody connected with him, was the person who transmitted it to the Chat-teris Book Society."

In an action for a libel contained in a pamphlet, a witness stated that she had received a copy from the defendant, and that she had read certain portions of it; that she had lent it to a third person, who had afterwards given her a copy back, which she *believed* to be the same she had lent to him, but that she would not swear that it was the same, yet that she had no reason to doubt it. This was held to be sufficient evidence of publication for the jury. *Fryer v. Gathercole*, 4 Exchequer Rep. 262. Pollock, C. B., said: "It appears to me that the question is resolved into one of *degree* only. When the circumstances of the case are examined, it appears that the witness could, with propriety, say no more than this: 'I believe the pamphlet produced to be the same as that I received from the defendant, because I received it from the person to whom I had lent it, and, for this reason, I expected to receive the same back again; and I had no reason to think it was not, although I cannot possibly identify it.' If she had put her name upon it before the witness had lent it, there would have been no doubt about the matter; but here she did so after it was returned. Independently of this fact, therefore, the question is, whether there is any evidence that the copy she had received back was the identical copy given to her by the defendant. My brother Alderson has put several hypothetical cases in the course of the argument, by way of illustration. Now, without considering the case of coin, let us suppose the case of a copy of a book,—a book which is extremely scarce, as, for instance, one of which only two or three copies exist,—and suppose a person from the British Museum were to be called as a witness, and he were to say: 'Mr. A. B. asked for the work the other day, and it was lent him, and he had it in his possession for some time, and he returned this one to me. I believe this to be the same work he received, but I will not pledge my oath to its being so. There are but two other copies of the work, one

at Paris, the other at Vienna.' Such a circumstance would exclude almost all possibility that the work returned was not the same. Now, suppose that a few other copies of the work existed, still there would be some evidence to go to the jury of the identity of the book. The evidence would be weaker. If a solitary copy only existed, the copy returned could not but be the same, and, in that case, the evidence must have been received. If there were twenty copies, the probability of its identity would be less; and so if there were five hundred, less still; and so on. In addition to this, the more frequently the party lends it, the probability becomes less that the one returned is the same with that lent; but of that probability the jury are to be the judges. It therefore appears to me that, when the matter is carefully examined, it comes to a mere question of degree or weight; but still there is some evidence for the jury. If there were some legal evidence to go to the jury in this case, there is no doubt that they were justified in their verdict; and as there was some evidence to go to the jury, and the objection, if any, was to the weight of it, the work was properly received."

The publication must be proved to have been made within the county where the trial is had. *The Seven Bishops' case*, 12 Howell's State Trials, 354. Where a libel was published in a newspaper printed in the State of Rhode Island, but which usually circulated in a county in Massachusetts, and the number containing the libel was actually circulated in such county, it was held, that this was conclusive evidence of a publication in such county. *Commonwealth v. Blanding*, 3 Pickering, 304.

If a libel is written in one county, and sent by post, addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county. *The Seven Bishops' case*, 12 Howell's State Trials, 331, 332. Thus, if a libellous letter is sent by the post, addressed to a party out of the county in which the venue is laid, but it is first re-

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ceived by him within that county, this is a sufficient publication. *Rex v. Watson*, 1 Campbell, 215.

The delivery at the post-office in L. of a sealed letter, enclosing a libel, is a publication of the libel in L. And where a person writes and composes a libel in one county, with intent to publish, and afterwards publishes it in another, he may be indicted in either county. *Rex v. Burdett*, 4 Barnewall & Alderson, 95. In this case, it appeared that the defendant, on the 22d of August, wrote and composed a libel in the county of L., and that he was seen in L. on that and the following day, and on the 24th the libel was delivered in the county of M. (100 miles off,) by A. to B., being enclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open, and it was not proved that there was on it any trace of a seal or postmark. A. was not called on the trial as a witness by either party, nor was it proved that he was a resident, or had been about that time in L. Under these circumstances, it was held by a majority of the judges in the King's Bench, that this was evidence on which a jury might properly be left to presume that the libel was delivered open to A. in L. It was also held in this case, that where it is proved that a defendant writes a libel in one county, and sends or carries it to some person, or to some place, (without proving to whom, or to what place in particular, it is so sent or carried,) for the purpose of publication in another county, and the libel is in fact afterwards published, this is evidence that the defendant published it in the county where it was written. For the sending or carrying the libel for such purpose was considered to be the commencement of the publication, of which the receipt and reading of it by the person (wherever he was) to whom it was so sent, was the consummation. 4 B. & A. 176, per Lord Tenterden.

A general confession, that the defendant was the writer of a libel, is no evidence that he published it in any particular county. *The Seven Bishops' case*, 12 Howell's State Trials, 183. And see the observations on this celebrated case by Lord Ellenborough, and Lawrence, J., in the text.

The general rule is, that the identical libel published must be produced. But where it is in the prisoner's exclusive possession,¹ or has been lost or destroyed, and perhaps in some other cases, where its production is out of the power of the prosecutor, then, as in other cases, secondary evidence is admissible of its contents. In *Johnson v. Hudson and Morgan*, 7 Adolphus & Ellis, 233, it appeared that the alleged libel had been published by being sung in the streets; that Morgan had printed 1000 copies of a song, of which 300 had been delivered at Hudson's shop; that the song complained of had been sung from a printed paper received of Hudson, and taken, at Hudson's shop, from a parcel containing about 300; and that it had since been destroyed; but the person who sung it swore that it corresponded with a printed song which was produced, and which had Morgan's name on it, as printer; and one of Morgan's journeymen swore that the printed song produced corresponded with that which Morgan had printed and delivered to Hudson. It was held, that there was sufficient secondary evidence to go to a jury of Morgan's having printed the paper from which the publication took place. Where a witness testifies that he is a subscriber for a certain newspaper, and being shown several papers of the same name and date, further testifies that the papers are in all respects similar to those left at his office, that the articles contained in the papers produced are the same that he had read in the copies left at his office; this was held to be sufficient proof of publication, without proving a loss of the papers originally left at the office. *Huff v. Bennett*, 4 Sandford, 120.

¹ In which case, notice to produce must be given before parol evidence can be given of its contents. *Winter v. Donovan*, 8 Gill, 370.

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In *Gathercole v. Miall*, 15 Meeson & Welsby, 319, this rule was fully and learnedly discussed. This was an action brought by the plaintiff, the clergyman of a parish, for a libel published in a newspaper called *The Nonconformist*. It was sought to prove that one of such newspapers had been sent to a public reading-room in the plaintiff's parish, to which there were eighty subscribers. The president of the reading-room testified, that a newspaper called *The Nonconformist*, which was the name of that published by the defendant, was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room, without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it was lost or destroyed. The learned judge, under these circumstances, held that secondary evidence of the contents of the paper was admissible." Alderson, B.: "It is clear, as it seems to me, that the evidence was properly received. I think the search should be such as should induce the judge to come to the conclusion, and the court afterwards, on revising his opinion, to come to the same conclusion, that there is no reason to suppose that the omission to produce the document itself arose from any desire of keeping it back, and that there has been no reasonable opportunity of producing it which has been neglected. Now, the question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for;

and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope, in which a letter had been received, and a person said, 'I have searched for it among my papers,—I cannot find it;' surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children, of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had *bonâ fide* endeavored to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper." H.

THE KING v. MARSH.¹

November 21, 1836.

Grand Jury — Number of — Writ of Error.

A grand jury ought not to consist of more than twenty-three persons.

Where more than twenty-three persons are sworn and sit upon a grand jury, and a bill of indictment is found by them to which a defendant pleads, and is tried and found guilty, the Court of King's Bench will not upon motion quash the indictment.

If more than twenty-three are sworn and sit upon the grand jury, the defendant, in an indictment found by them, may, if that fact appears upon the caption of the indictment, bring error in law. If it does not appear there, then he may bring error in fact.

The Court of King's Bench will not receive an affidavit of a grand juror as to what passed in the grand jury room, upon the subject of a bill of indictment.

THE defendant was indicted at the general sessions, held in February last, for the town and port of Dover, for soliciting one Joseph Moore to personate one John Moore at an election for councillors of the Pier ward of Dover. This indictment was removed into the Court of King's Bench by *certiorari*, obtained at the instance of the defendant. The indictment was tried at the Kent summer assizes in 1836, before Lord Abinger, C. B., and the defendant was found guilty. In this term Sir J. Campbell, A. G., applied for a rule *nisi* to quash the indictment upon several affidavits, one of which was made by the foreman of the grand jury, and stated that the grand jury consisted of twenty-eight persons, and that twenty-five having sat in consideration upon the bill; twelve voted for the finding of the bill, and thirteen against it. That the jurymen had asked the recorder² what number of grand jurymen was necessary for the finding a bill, and he told them that twelve must concur in the finding, upon which they brought in the bill, although a majority of those who took it into consideration voted against it. The affidavit of another person, who was not a jurymen, stated that twenty-eight persons were sworn upon the grand jury. The town clerk stated, that he was unable to say, from a reference to the minutes of the sessions, how many persons were sworn on the grand jury, there being no mark to distinguish those who were sworn from those who were not; that the officer who summoned the jury returned the names of thirty-one persons, and that he swore in as grand jurymen all of the number

¹ 1 Nevile & Perry, 187; 6 Adolphus & Ellis, 236.

² It was stated to the court, by the attorney-general, that the recorder did not know that more than twenty-three were sworn on the grand jury.

returned, who presented themselves at the opening of the sessions; that, to the best of his recollection, he swore in on such grand jury a greater number than twenty-three persons, and that he was induced to swear in all who presented themselves, in order to avoid any imputation that he made a selection for political reasons, as he was aware that a bill of indictment would be preferred against the defendant, about which a great deal of excitement prevailed. It appeared also by an affidavit made by the person who summoned the grand jury, that more than twenty-three were sworn. The following authorities were cited by the attorney-general in support of the motion, *Sykes v. Dunbar*, 2 Selwyn, N. P. 1066, 7th ed.; note by Mr. Christian to the 4th vol. of Blackstone's Commentaries, p. 303; Archbold's Criminal Law, 4th ed. p. 58; Hawkins's Pleas of the Crown, Vol. 2, p. 651; and the entry made by Sir J. Burrows, master of the crown office, in 1760, with the observations of Lord Mansfield, C. J. It was observed by Lord Denman, C. J., in the course of the argument, that both the oath taken by each grand juror, and public policy, prohibited what occurred in the grand jury room from being made public. The court granted a rule *nisi*, on the ground that in swearing more than twenty-three persons on the grand jury, the usual course of public justice had been departed from; and it was said by the court, that they could not take into consideration what occurred in the grand jury room. That part of the affidavits which stated what occurred in the grand jury room having been struck out, the rule was drawn up.

Platt and *Adolphus* now showed cause against the rule. As the grand jury consisted of twenty-eight, and twenty-five voted, it is to be intended that twenty-eight found the bill. The earliest authorities show that an indictment found by twelve men was sufficient. A majority was not required except in cases where the grand jury consisted of twenty-three, and then of course twelve formed a majority. In *Coke upon Littleton*, 126 b, an indictment is defined to be in law an accusation found by twelve or more upon their oaths. It may be found by more than twelve men, but if found by twelve it is sufficient. In *Hale's Pleas of the Crown*, the nature of the summons in virtue of which the jury were to attend, is stated, and it is there said, that the sheriff is to summon twenty-four. 2 *Hale*, P. C. 154. In the same book, (*Ibid.* 161, citing *Lamb. Just.* 400,) it is said if there be thirteen or more of the grand jury, a presentment by less than twelve cannot be made, but if twelve assent to it, it is sufficient. The circumstance that in general only twenty-three are sworn, is merely the result of convenience. In *Comyns's Digest, Indictment*, (A), an indictment is defined to be "an accusation or declaration at

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the suit of the king, for some offence found by a proper jury of twelve men." In 2 Hawkins's Pleas of the Crown, 299, 6th ed., it is said, "an indictment is an accusation at the suit of the king by the oaths of twelve men of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true." It is defined in the same manner by Mr. Justice Blackstone, in his Commentaries. 4 Bl. Com. 302, 18th ed. It is there said, "To find a bill there must at least twelve of the jury agree;" and Viner, in his Abridgment, Indictment, (H 9) 5, adopts the authority of Hawkins. It plainly appears from all these authorities, that in order to put a man upon his trial it is sufficient that the bill should be found by twelve men. But there is another objection to this application,—it is too late, the defendant has been tried and convicted—he has declared his innocence, he has put himself upon his country to have that question of his guilt or innocence decided, and the verdict of the jury has been against him. There has therefore been a finding of twelve of the grand jury and a verdict of twelve of the petty jury against him, and he has been thus convicted upon the oaths of twenty-four men. The substance of the motion now made should have been brought before the court where the indictment was found, by a plea in abatement, but after a conviction, this court cannot give the defendant the benefit of a plea in abatement upon a motion of this sort. Such a plea would have brought the question of the jurisdiction of the court fairly under consideration, but the defendant having once submitted to the jurisdiction, cannot now dispute it. Suppose this court give judgment that the indictment be quashed, the record will then present this appearance,—the finding of the indictment, the arraignment, the plea, the issue, and the verdict of guilty, will all be regularly entered, and then it will appear, notwithstanding this, that the court ordered the indictment to be quashed.

[COLERIDGE, J. Will it not form a part of the record that the indictment was found upon the oath of twelve men?]

It is apprehended that it will not.

[COLERIDGE, J. In the Appendix to the fourth volume of Blackstone's Commentaries, there is the form of a record of an indictment and conviction of murder at the assizes, and there the names of the grand jurors are mentioned.

LORD DENMAN, C. J. The practice in the crown office is not to mention the grand jurors by name, but that the indictment is found by the oath of twelve good and lawful men. The caption in this case will be made up at the crown office.]

The error in that case will be apparent on the record. With

respect to the passage from 2 Burrow's Reports, 1088, it is not there laid down that the grand jury must not consist of more than twenty-three, but that that is the most convenient number. In illustration of the argument, Dr. *Sheridan's case*, 31 How. State Trials, 543, may be referred to; he was indicted under the Irish Convention Act, 33 Geo. 3, ch. 29, and it was objected that there were improper persons on the grand jury, but the objection in that case was taken at the trial.

Sir *J. Campbell*, A. G., and *Channell*, in support of the rule. This question is to be decided upon a general principle, and not upon any particular inconvenience. It is clear that the bill must be found by a majority of the grand jury, and the number of twelve was merely mentioned by the recorder as the smallest number that could constitute the majority. But that number must be sufficient to constitute a majority, or it was good for nothing. The opposite doctrine is quite untenable, for if any number might be sworn on the grand jury, out of one hundred sworn, if twelve are sufficient to find a bill, twelve out of the one hundred might be in favor of finding the bill and eighty-eight against it, and yet, according to the doctrine now contended for, such a bill would be properly found by a grand jury. No one could gravely venture such an assertion.

[Lord DENMAN, C. J. The court does not entertain the least doubt that twenty-three is the proper and limited number, and that the swearing such a number only is a matter of practice distinctly recognized by authorities in the way in which undisputed propositions are always received. You need not, therefore, argue that point.]

If that be so, then this bill was a nullity. *Hawkins*, P. C. b. 2, ch. 50, § 3. It was the same as if it had been found by less than twelve, or as if the number of the grand jury had not been sworn, or the witnesses before them not sworn, in all which cases it is clear that the defendant might at any time object to the indictment. In a case from the Northern circuit, where after trial it appeared that the witnesses on whose testimony the grand jury had found the bill, had not been sworn, *Bayley, J.*, who had previously passed sentence on the prisoner, reserved the question for the opinion of the twelve judges, who recommended the prisoner to mercy. There it might have been said to the prisoner, you may bring error in fact. If the defendant might, as it seemed to be admitted, bring a writ of error, the court, on being convinced that the ground for that error really existed, would at once relieve him on motion.

Lord DENMAN, C. J. No authority has been cited to show that we are bound to quash the indictment. Probably the mistake which

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has occurred will appear in the caption of the indictment. If it does, the defendant may bring error in law. If it does not, he may bring error in fact; there is therefore another mode of proceeding open to him.

PATTESON, J. Some express authority should have been shown to authorize us to quash this indictment, after the defendant has pleaded and gone to trial upon it. Whether the defendant can bring error in fact or in law, will depend upon whether the mistake appears upon the record.

WILLIAMS, J. The defendant, who was aware of the mode in which the bill was found, pleads to the indictment and takes his trial. After he is found guilty, he comes to this court and asks to have the indictment quashed. Under these circumstances we ought not, in my opinion, to interfere.

COLERIDGE, J., concurred.

Rule discharged.

That body of accusers, now called a grand jury, originally consisted of only twelve persons. Bracton, Book III. 116, speaks of this as their number within each hundred. Britton also states, ch. 2, "et a chescun *dozeyne* soient les chapitres severement liveres." The *Mirroure*, ch. 1, § 12, says of the duty of the coroner, which was to hold many of the pleas of the crown, — "les jurors soient severés *per douesseins*, si que nul *doussein* ne parle à autre, eins respoigne chescun jurey per soi," or, as translated in Horne's *Mirroure*, p. 43: "The jurors are severed into dozens, so that one dozen shall not speak with another, but that every jury must answer by itself." An early Saxon law in Ethelred's reign, (A. D. 978-1016,) directed "that twelve thanes, with the sheriff at their head, should go and on their oaths inquire into all offences, not charging any one falsely, nor wilfully, nor suffering any offender to escape." And in 13 Edw. I. ch. 13, (A. D. 1285,) it was enacted that sheriffs in their tourns should cause their "inquests of malefactors to be taken by lawful men, and by twelve at the least, which shall put their seals to such inquisitions, and those that shall be found cul-

pable by such inquests, they shall take and imprison, as they have used aforetime to do." In those early times each jury presented only for its own hundred, and when consisting of only twelve, entire unanimity was necessary to their action. But afterwards, in 42 Edw. III. (A. D. 1368) the sheriff was directed to return, in addition to the usual number of twelve, a panel of knights, which formed what was called "*le grande inquest*;" the name being used not as at the present day, to distinguish the accusing jury from the trial jury, but to indicate that they were summoned from the whole county, and not merely from a hundred. Their duty was to present for the whole county, instead of simply for a hundred; twelve being still required for a finding, in accordance with immemorial antiquity. The jury for each hundred being thus superseded by this more numerous body, gradually fell into disuse, and the entire duty of accusing offenders became vested in the latter body. There is some reason to suppose that at one time the number of the grand inquest was but sixteen, which may be the reason why Arkansas and perhaps some other American States have by statute adopted

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that number. *The State v. Hawkins*, 5 English, 71. But at what time, or for what reasons, the number was enlarged to its present extent, may not be exactly known. Probably the increase was gradual, as the wants of society increased. Spelman says: "Jurata delatoria excedat duodenum, quotis judici placuerit; non autem deficiebat." It never however reached higher than twenty-three, so that the original twelve might always remain a majority of the whole body, and be able to present on the finding of the same number as of ancient times. And although Mr. Baron Platt is reported to have said, in 3 Cox, C. C. 434, (1849,) that he saw no reason why the number of a grand jury should be limited to twenty-three, and actually allowed twenty-five to sit and act on the jury; yet the rule of the common law is perfectly settled on the subject, whatever might have been its origin, or whatever the reasons on which it was originally founded. It is, as expressed by Lord Denman, in 6 Ad. & El. 241, "a matter of practice, proved by authorities in the only way in which proof can be given of a point of that kind which has been undisputed." Another proof of such rule may be found in 2 Burrow, 1088, in 1760. The reporter says in a note: This being grand jury day, it was intended by the sheriff, and pressed by the two knights of the shire for Middlesex, that all the principal gentlemen of the county, (not fewer than fourscore in number) should be sworn of this grand jury, in order to their being included in an address to his majesty, from and in the name of the grand jury of Middlesex, upon his accession to the crown. But, upon the sheriff's mention of this to me, it seemed to me irregular and improper to swear more than twenty-three. Because, if a number amounting to two full juries or more should be sworn, it might happen that a complete jury of twelve might find a bill to be a true one, though other twelve, or even many more than twelve of the very same jury, might reject it as an untrue one; which would be inconvenient as well as contradictory, and even somewhat absurd and ridiculous. Lord Mansfield,

upon being apprised of this, said it would be monstrous to swear fourscore; and that the officer could not properly swear more than three and twenty. So in *The People v. King*, 2 Caines, 98, (1804) Kent, C. J., thought it a fatal objection to an indictment that twenty-four persons were sworn on the grand jury who found it.

That twelve continued to be the minimum number of a grand jury is equally clear. For, as early as 41 Eliz. (A. D. 1599) in *Clyncard's case*, Cro. Eliz. 654, it was distinctly held that the grand jury could not consist of less than twelve, and that the indictment should show that it was upon the oath of twelve men. And judgment was reversed for want of it. See also *The State v. Symonds*, 36 Maine, 128, (1853). The rule of the common law was also distinctly recognized in America in the late case of *Commonwealth v. Wood*, 2 Cushing, 149, (1814,) but it was there contended by the defendant that the statute of Massachusetts, directing the clerk of the court to issue writs of *venire facias* for twenty-three grand jurors, was a legislative declaration that there must be that number on the panel, and therefore that an indictment found by a jury of only twenty-two was insufficient. But the court held the statute directory merely, in order that the attendance of a sufficient number of persons might be secured, but that the number necessary for a quorum was still regulated by the common law. A similar view was adopted in North Carolina, in *The State v. Davis*, 2 Iredell, 153, (1841,) where a statute directed eighteen persons to serve as grand jurors, yet a bill found by a jury of only fifteen was held good. The Supreme Court of Indiana adopted the same rule in *Hudson v. The State*, 1 Blackford, 317, (1824). See to the same effect, *Pybos v. The State*, 3 Humphreys, 49, (1842,) in Tennessee. So in Alabama, *The State v. Miller*, 3 Alabama, 343, (1842).

A contrary view was taken of the statute of Ohio, on this subject, in *Doyle v. The State*, 17 Ohio, 222, (1848). And see *Young v. The State*, 6 Ohio, 435. The statute of that State was thought to require that the grand jury should always

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consist of fifteen persons, but an examination of the law of that State does not indicate any more positive or peremptory words, than the terms used in the statutes of the other States before referred to. Probably, however, the decision itself was correct, since one of the fifteen jurors was not a person qualified by statute to serve as grand juror, and for this reason the indictment was irregular. For it follows as a necessary consequence, (whatever be the number of the grand jury actually in session, whether twelve or twenty-three,) that every one must be legal and qualified to serve as a juror, or their indictment will be void, since the incompetent juror might have been one of the twelve necessary to have united in finding the bill. This is the rule laid down by all the elementary writers on criminal law, and was distinctly adopted in *Barney v. The State*, 12 Smedes & Marshall, 68, (1849); *The State v. Duncan*, 7 Yerger, 271, (1834); *The State v. Jacobs*, 6 Texas, 99, (1851). This would seem to be so on general principles, but there may have been in early times some doubt about it, as we find that in the eleventh year of Henry IV. (1410) a statute was passed, enacting that "any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect." The proper mode, in case an incompetent juror is summoned, is to discharge him, and either supply his place, or allow the others to proceed to business without him, if there are the proper number qualified. *Commonwealth v. Barton*, 4 Leigh, 645, (1832).

Therefore if a grand juror be added to the panel by the court in a manner not authorized by law, it vitiates the whole action of the jury, and their indictment is altogether invalid. See *The State v. Symonds*, 36 Maine, 128, (1853), where the court, in order to fill vacancies in the panel, issued new writs of *venire facias*, without any express authority given them by statute so to do. See also *Portis v. The State*, 23 Mississippi, 578, (1852). In some States, if the number of the grand jury first summoned is insufficient, the panel may be completed from the bystand-

ers. *Dowling v. The State*, 5 Smedes & Marshall, 664, (1846).

As to the mode and time of objecting to the validity of a bill found by a grand jury composed of too small, or too large a number of persons, a proper mode, judging from analogy, would seem to be by an application in the nature of a plea in abatement. See Sir William Withpole's case, Cro. Car. 134, (1603); *The State v. Symonds*, 36 Maine, 128, (1853); *The State v. Middleton*, 5 Porter, 484, (1837); *The State v. Herndon*, 5 Blackford, 75, (1839); *Barney v. The State*, 12 Smedes & Marshall, 68, (1849); *Vattier v. The State*, 4 Blackford, 71, (1835); *McQuillen v. The State*, 8 Smedes & Marshall, 587, (1847). For, after a plea of not guilty to the charge in the indictment, and *a fortiori*, after a verdict of guilty, it is too late to object to the organization or proceedings of the grand jury. *The State v. Clarissa*, 11 Alabama 57, (1847); *The State v. Martin*, 2 Iredell, 101, (1841); *The State v. Seaborn*, 4 Devereux, 305, (1833); *The People v. Griffin*, 2 Barbour, 427, (1848); *Fenalty v. The State*, 7 English, 630, (1852); *McQuillen v. The State*, 8 Smedes & Marshall, 587, (1847); *The State v. Borroum*, 25 Mississippi, 203, (1852).

Lord Denman, in the leading case, observes, that if the record of the indictment and conviction should show the mistake in the number of the jury, a writ of error in law would lie to reverse it; but if not, the defendant might bring writ of error in fact. In America it is not generally customary to recite how many composed the grand jury, *Young v. The State*, 6 Ohio, 435, and therefore a writ of error in fact would be the appropriate remedy. But whether any of the grand jury could be summoned to prove how many were present when the bill was found, or how many voted in its favor, may not be entirely agreed. The principal case is opposed to the practice of proving such facts by the jury themselves, and an analogous rule is adopted in other courts. *The State v. Fassett*, 16 Conn. 457, (1844); *The People v. Hubbard*, 4 Denio, 133, (1847); *Inlay v. Rogers*, 2 Halsted, 347, (1800).

On the other hand, in *Low's case*, 4 Greenleaf, 439, (1827,) the Supreme Court of Maine, after careful deliberation, determined that a defendant might prove by the grand jurors themselves that twelve did not concur in finding a bill, and that they supposed they could legally find a bill upon the vote of a majority present, although less than twelve. The application to prove such facts came up by way of a motion, in the nature of an application, as it was treated by the court, to amend the record, which was alleged to be a mistake. It was strenuously opposed by the attorney-general, as being against public policy, against immemorial usage, and against law. It was also urged that it would be contradicting the record, which was conclusive that the requisite number concurred in finding the bill. But the court granted the defendant leave to prove such facts by the grand jury, and as the question is a very important one, and the decision apparently in conflict with the general doctrines of allowing proof by the members of a jury of their own proceedings, we give in full the reasoning upon which the decision proceeded. Weston, J., said: "The concurrence of twelve grand jurors is necessary to find a bill. The party accused cannot be legally held to answer upon the finding of a less number. And this privilege is secured to the citizen, in crimes capital or infamous, by the provisions of the Constitution. These positions are not denied; but it is insisted that, when an indictment is once verified by the attestation of the foreman of the grand jury that it is a true bill, and as such been presented to the court, and ordered to be put on file, it then becomes a matter of record, and furnishes conclusive and incontrovertible evidence that it was found by the requisite number. I am satisfied that an indictment, thus sanctioned, is to be regarded as a record, and that it has all the legal verity which belongs to that species of evidence; and I admit that, according to our practice, it proves the fact that twelve or more agreed to the bill. I think the certificate of the foreman must be necessa-

rily understood as implying this, and as constituting the proper evidence of the fact; it not here appearing in the caption that it was found by twelve men, according to the usage in England. But while I recognize the absolute certainty, which a regular judicial record carries with it, and the policy upon which it is founded, I am also of opinion that there is, and always has been, and from the necessity of the case must be, a power in the court to vacate, or to cause to be amended, a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers. I entertain no doubt that the court may exercise this power at any time, according to their discretion; but unquestionably while a criminal prosecution, or a civil suit, is yet in progress, and has not finally terminated. It is not to be understood that the rights of parties are to be concluded, and that without remedy, by the errors and mistakes, to say nothing of the fraud, of a recording officer. To subject a record to the superintending and revising inspection of the court, is not to impair the rule of evidence under consideration. That there may be an end of controversy in regard to facts, the truth of which has been established in judicial proceedings, no averment or proof is received against the record; but it is competent for the court to say, if they are satisfied that the claims of justice require it at their hands. This is not our record; it is false and erroneous, and the authentication which it bears is unauthorized and unwarranted.

The return of the sheriff, upon mesne or final process, has the character of a record, and as such is incontrovertible; and yet it is no uncommon practice for the court, in their discretion, to permit him to amend it. And upon the suggestion of the clerk that an error has crept into the record, through the inadvertency either of himself or his substitutes, the court being satisfied of the truth of the suggestion, do not hesitate to order its amendment.

It is well known that in our practice, when the grand jury come into court, upon being inquired of whether they have

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agreed in any bills, and the foreman answering in the affirmative, he is directed to hand them in; whereupon they pass from his hands, through the intervention of an officer, to the clerk. They are not read over, nor is the substance of them stated, or the persons named against whom they are found. It is taken for granted that the foreman returns only such as the requisite number have concurred in; but no inquiry is made of his fellows, nor is it made known to them at the time what bills are passed over to the court. Let it be supposed that after they have been received and ordered to be filed, and the grand jury discharged, it should happen to be suggested to them that among the number is one charging a certain citizen with a certain crime. If, therefore, every juror, except the foreman, should present himself, and offer his affidavit that he never agreed to such a bill, is there any power in the court to receive such testimony, and, if assured of its truth, to give relief? Or if the foreman, after the grand jury has been dismissed, discovering his mistake, should suggest to the court, and offer to support his statement by oath, and by the corroborating testimony of every member of the jury, that the attorney-general had drawn two bills against a party accused, one for murder and one for manslaughter, and had left them with the jury, that they might make use of one or the other, as they might find the facts, that a competent number of them had agreed in the bill for manslaughter, but that he had since discovered that he had inadvertently signed and presented as true the bill for murder, to which they had not agreed, is the judicial power so defective that this error must remain without correction? If so, the life of a citizen may be brought into jeopardy, in violation of both his legal and constitutional rights, under the pretence of a necessary adherence to the letter of a technical rule.

It may be said that to permit an inquiry of this sort would open the door to great abuses; that it would afford opportunity to tamper with the jury; and that it would lessen the respect due to the

forms and solemnities of judicial proceedings. These are considerations which address themselves strongly to the attention of the court, and cannot fail to have a deep influence in the exercise of their discretion. It could only be in a very clear case, where it could be made to appear manifestly, and beyond every reasonable doubt, that an indictment apparently legal and formal, had not in fact the sanctions which the law and the constitution require, that the court would sustain a motion to quash or dismiss it, upon a suggestion of this kind.

The oath of the grand juror requires him to keep secret the State's counsel, his fellows', and his own. Of this character may be, what particular jurors agreed or dissented, upon the questions whether a true bill or not; and also the testimony exhibited before them, or such parts of it as the attorney-general may wish to keep secret, until developed at the trial. But the fact, whether twelve or more concurred or not in the bill, is not a secret. It is a result which they are required, through their organ the foreman, to make known; and it is of the deepest importance to the public and to the accused that it should be truly disclosed.

There might have been less difficulty in supporting this motion, if it had been made at the first term, when the facts were fresh in the recollection of the jury; but their mistake, it is stated, had not then been discovered, and the party charged was not before the court. It is understood that the foreman, who signed this bill, happening to be present at the succeeding term, was, from the charge of the judge to the grand jury, apprised that a bill could be found only by twelve or more, whereas he had before supposed that a majority was sufficient. Finding that his mistake had operated to the prejudice of Low, the defendant, he disclosed the fact; and he now states in his affidavit, if it can be received, that although a majority of the jury agreed in finding the bill, that majority did not consist of twelve. If the mistake had been discovered before the discharge of the grand jury, better and more satisfactory means of ascertain-

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ing it would have been afforded. But it appears to me that the door to further inquiry is not therefore necessarily closed; and that this presents a case, in which the superintending power of the court, in correcting any mistakes which may arise in its proceedings, may and ought to be exercised; and that the testimony offered in support of the motion, together with any counter evidence which may be adduced on the part of the State, ought to be received.

The conclusion to which I have arrived is not, I apprehend, without authority. In 2 Hawkins, 307, cited in the argument, it is stated that if it appear, from the caption, or otherwise, that less than twelve jurors agreed in the indictment, it must be quashed. In the *Commonwealth v. Smith*, also cited, Sewall, J., who delivered the opinion of the court, adverting to the principle that indictments, not found by twelve good and lawful men, are void and erroneous at common law, says, 'An irregularity in this respect, if it should happen, might become a subject of inquiry, upon a suggestion to the court.' This position is not inconsistent with what he afterwards states, that no averment to this effect can be admitted by a formal plea. No averment by way of plea can be received against a record; but the court may determine, upon suggestion, whether that, which is apparently a record, is in

truth entitled to that character. The judge further intimates that objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found. In the *Commonwealth v. Parker*, 2 Pickering, 563, the court do not appear to approve of this limitation, stating that 'there is a difficulty in the case; for a bill may be found against a person, who has not been recognized to appear, and who has no opportunity to challenge.' But after the grand jury is returned and impanelled, the question whether an indictment, presented to the court as a true bill, was assented to by twelve or more, is in its nature subsequent to any which may be raised as to their personal qualifications."

But it is doubtful how far such a practice is consistent with the principles of public policy, or with the oath of secrecy taken by the grand jury. Indeed it seems to be contradicting the record itself, since the certificate of the foreman to each bill, "a true bill," *ex vi termini*, imports that it was found by twelve or more jurors. It would not be a true bill unless so found. See *Turns v. The Commonwealth*, 6 Metcalf, 234, (1843); *Harriman v. The State*, 2 Greene, 270, (1849). That a plea is not admissible contradicting the record, see *Tuck v. The State*, 7 Ohio, 240.

E. H. B.

Trial by Jury — Twelve necessary — Unanimous Verdict.

JOHN W. WORK v. THE STATE OF OHIO.¹

December Term, 1853.

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Trial by jury, at common law, means a trial by a jury of *twelve* men, impartially selected, who must unanimously concur in the guilt of the accused before a conviction can be had. A statute diminishing the number of such a jury in a criminal case, or authorizing a verdict without a unanimity, is contrary to the Constitution, and wholly void.

ERROR to the Probate Court of Hocking County.

The plaintiff in error was, at the August term, 1853, charged, by information, with assault and battery. Several matters of exception arise on the overruling of a motion made by the defendant, to strike the information from the files, and a like motion to quash; but the only questions examined by this court relate to the trial of the cause below. The plaintiff in error, on the overruling of the said motions, filed a written demand for a trial by jury. A jury of six men being called, (the same that was regularly summoned for the term,) the then defendant "being called upon to state whether he had any objection to said jury, made objection, that the same is not a legal, constitutional jury, because not a jury of twelve men; and therefore objected to the array of said jury." This objection was overruled, and exception taken. A verdict and judgment against the defendant being entered, this writ is sued out to reverse the judgment.

H. H. Hunter, for the plaintiff in error, presented a written brief, from which the following is taken, being all that relates to the question decided by the court:

The more important question arising for consideration in the case is, whether a party accused of a crime or offence has the right, under the Constitution of Ohio, to demand a trial by jury of *twelve* men.

As yet, no law has been enacted by the legislature reducing the number of jurors, in the trial of crimes of the higher classes, below the number twelve. But it must be admitted that, if the legislature may provide for the trial of minor offences by a jury of *two* men, or *three*, or *six*, they may also, for the same reason, provide that the higher crimes of murder, &c., may be tried by a like jury. No distinction is made in the Constitution between crimes and inferior

¹ 2 Ohio State Reports, (1 Warden,) 296. The marginal notes in the original report have been somewhat varied in this case.

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offences in this respect; but it provides for all alike. "In *any* trial, in *any* court, the party *accused* shall be allowed to . . . have a speedy public trial by an impartial jury of the county," &c. Article 1, § 10. Also, "The right of trial by jury shall be inviolate." Article 1, § 5.

Whatever the right of trial by jury may consist in, in criminal cases, it is saved to "*the party accused*," in all cases alike, whether punishable capitally, by imprisonment in the penitentiary, by fine, or otherwise. Now, what is this *right* — in what does it consist? Is it an unmeaning, imaginary thing, possessing no definite, well-understood characteristics? Or, is it the contrary? What, according to the invariable usage in Ohio, prior to the adoption of our present Constitution, was understood by the terms "trial by jury," in criminal cases; and what has always been understood to be their meaning throughout the United States, and wherever else the common law of England has prevailed? It is unnecessary to answer these questions at large; but it is well known that, in Ohio, all trials by jury, in criminal cases, have been by a jury of twelve men. The people of Ohio have no practical notion of any other number of men to compose a jury, and none other could have entered into the minds of the constitutional convention, in securing to the citizens this sacred right of trial by jury. It cannot, in my humble opinion, ever be said truthfully, that the framers of the Constitution intended to confer on the legislature the power to alter the number of men required by the uniform practice of the country to constitute a jury, by fixing a less number than twelve. And if a law were enacted fixing the number of jurors, to try capital cases, at *two, three, four, or six* men, the whole community would denounce it as unwise and unconstitutional. But why unconstitutional, when the Constitution is silent as to the number of persons required to form a jury? I answer, simply because the language used in the Constitution, although not specific as to the number of jurors, cannot, without violence to the universal understanding of the people, be so construed. The terms "trial by jury," in so far as regards the number of men required to compose a jury, for the trial of issues of fact in courts of record, have by long use acquired a specific or technical meaning as well as a popular meaning; and this technical and popular meaning are in exact conformity the one with the other. All men of experience and observation know that this is so; and it cannot, consistently with candor, be denied by any intelligent person of mature years. The framers of the Constitution had a right to suppose, and no doubt did suppose, that they had done and said all that was necessary, by the language used in the Constitution, to protect the citizens of the State against being tried for their lives or their

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liberty by any other than a jury of twelve men. And they did not intend to leave this important question subject to be regulated or modified by legislative discretion or indiscretion. Nor did the constitutional convention, in providing for the security of this right, think it wise or expedient to discriminate between crimes of different grades, as they did in regard to the form of the accusation. On the contrary, care seems to have been taken to prevent any misapprehension of what was intended in this regard, to wit, to secure to parties "*accused*" in *all* cases, regardless of the nature of the crime or offence, the right to a speedy jury trial.

We are bound, therefore, to conclude, that if it is competent for the legislature to provide by law, that persons accused of the offence of assault and battery may be required to submit to trial by a jury of six men, the same thing may, for the same reason, be required of persons accused of murder or other crime. And a further consequence must also follow, to wit, that if the legislature have the power to reduce the number of the jury to *six*, they may, for like reason, reduce it to any less number.

It is no answer to this to say, that there is no danger of this—that the legislature would not be guilty of so great an act of folly and injustice, &c. I ask, why not? If there is no advantage to the party accused in having a jury of twelve men, it is surely great folly to burden the public with the expense of keeping so large a body of men in attendance upon your courts. As a measure of economy, a jury of *two* good men would be preferred to *six* or *twelve*. But nobody would like to substitute a jury of *two* in place of twelve. Why not? Simply, because there is a less degree of safety to the party accused. *Two* may be corrupted much more readily than *six*, or *six* than *twelve*. There is safety, also, against the influence of prejudice or passion in a body of twelve men over six, or any smaller number. There is also a much greater degree of certainty that twelve independent minds, acting in concert in the investigation of a complicated state of facts, will, by one or another of them, seize upon all the material facts, than would a smaller number. So, also, with regard to the bearings and different views of facts; and when they all come to act together as one mind, and unite in one opinion as the result of their deliberations, the number twelve is altogether more reliable than a smaller number, all other circumstances being equal. At the same time that a body of twelve men is, for these reasons, as a jury to try the facts in cases of all descriptions as they arise, not too numerous a body, it possesses obvious advantages over a larger body in several respects. It is not too numerous to admit of their agreeing upon a verdict, or to be onerously expensive for the purposes for which juries are called.

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It is true, no doubt, that very many cases arise to be tried by a jury, in which one or two men would answer the purpose as well as twelve men. But such cases are distinguished by their peculiar circumstances more than by the particular offence. It is very easy to understand how questions of the gravest importance affecting the moral character and reputation, for life, of an individual, may arise in cases in which the punishment is less than imprisonment in the penitentiary, and the *trial* involves a most complicated investigation of facts, and collaterally involving questions of most vital importance, such as the character and credibility of witnesses and the like. A man may be charged with petit larceny, and his character and hopes in life, or those of a worthy family, be blasted forever by an unjust conviction. It is true, this may happen by a jury of twelve men before an enlightened court; but the *danger* is increased a thousand fold by a jury of six men and a court composed of men of the grade of intelligence, such as in many counties in Ohio even now have the honor to fill the office of Probate Judge. And it is greatly to be feared that time, with the operation of inferior salaries, will speedily drive away all of those who now worthily fill the place.

The following authorities, referred to in a recently published opinion by Judge Hurd of this State, will be found, I think, so far as authorities are entitled to consideration, as pertinent, if not decisive.

I also beg leave to submit the published opinion of Judge Hurd. It will be found in a newspaper herewith filed: —

Den v. Baldwin, 2 Penn. Rep. 945; *Mitten v. Smock*, 2 Penn. Rep. 911; *Dowling v. The State*, 5 Smedes & Marshall, Miss. R. 664; *Bud v. The State*, 1 Howard, Miss. R. 177; *The State v. Cox*, 3 Eng. Ark. R. 436; *Larillan v. Lane & Co.* Ibid. 372; Law Reporter, vol. 6, No. 1, p. 26, *Vermont case*; 6 Metcalf Rep. 231 (arg.); *Footle v. Lawrence*, 1 Stew. 482; Tomlin's Law Dictionary, vol. 2, p. 307; Bouvier's do., vol. 1, p. 552; Bouvier's Institutes, vol. 3, p. 324, 327; 3 Blac. Com. 352, 380; 3 Bac. Abr. 728.

George W. McCook, Attorney-General, cited the following authorities in his *mem.* for argument:

Hunt v. Mason, 5 Ohio, 134; 2 Wilson's Law Lec. 300; Jac. Law Dict. tit. Jury; *Wyland v. Hamilton*, 7 Ohio, part 2, 110; 3 Bl. 352, Ib. ch. 23, Ib. 365; *Edward I. v. Bishop of Winchester*, 1 Rat. part 19; Forsyth's Trial by Jury, 147, 149, 207; Ib. ch. on "Unanimity," 4 Bl. Com. 352.

RANNEY, J., delivered the opinion of the court.

We shall notice but one of the errors assigned, as in the opinion of the court that is decisive of the case, and upon a ground that pre-

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cludes the possibility of remanding it for another trial. The plaintiff in error was charged with the offence of assault and battery, tried by a jury of six men under the act of March 14, 1853, "Defining the jurisdiction and regulating the practice of Probate Courts;" found guilty, and sentenced to pay a fine of one hundred dollars and costs. He objected to the proceeding in various ways during its progress; and now insists that the act under which it was had, in so far as it authorizes a conviction upon the finding of such a jury, is unconstitutional and void.

Two sections of the first article of the Constitution are relied upon.

Section fifth provides: "The right of trial by jury shall be inviolate."

In section 10, it is provided: "In any trial, in any court, the party shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offence is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offence."

By the first of these sections, the *right* of jury trial is recognized to exist, and its continuance unimpeached is provided for. By the last this right is declared to belong to every person accused of any crime or offence, in any court of the State.

What, then, is this right? It is nowhere defined or described in the Constitution. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind. The same article furnishes other examples of the same generality of expression. By the 8th section: "The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety require it." In what does the privilege of this great bulwark of personal liberty consist? The Constitution furnishes no answer, nor was it necessary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the habeas corpus, stand as representatives of ideas as certain and definite as any other in the whole range of legal learning.

The institution of the jury referred to in our Constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter, and its benefits secured to the freemen of England, and

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again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property: The same, brought to this continent by our forefathers, and perseveringly claimed as their birth-right, in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind, in waging the contest which resulted in independence. Nor did their affection for it then diminish or cool. They made it a corner stone in erecting the State governments; and after the adoption of the federal Constitution, without a provision securing it, they did not rest satisfied, until they had proposed and carried an amendment, giving to every person accused of crime in the courts of the Union, "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

In the ordinance of July 13, 1787, which first extended civil government over the territory north-west of the river Ohio, it was made an unalterable article of compact, that "The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury." Upon the organization of the State government in 1802, provisions, substantially the same as those in the present Constitution, were inserted in the bill of rights. It thus appears, that persons accused of crime have, for every moment of time since civil government existed within the territory of this State, by fundamental laws, been secured in the right of trial by jury. An institution that has so long stood the trying tests of time and experience, that has so long been guarded with such scrupulous care, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it.

It remains to consider what were the distinguishing features of this mode of trial as it existed at common law, and as it has always been known and used in this country. I do not propose to attempt to discover its origin, or to determine at what time, or by whom, it was first introduced into England. Able men, with all the information to be had, have differed upon it. The distinguished commentator upon the laws of England informs us, that traces of it are to be found in the laws of all those nations which adopted the feudal system, "who had all of them a tribunal composed of twelve good men and true;" and that "the truth seems to be, that this tribunal was universally established among the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other." After delineating with admirable clearness the means the law has provided to secure the independence, purity, and impartiality of the jury; and painting in

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glowing colors the many advantages of this mode of trial; this author proceeds to say: "Upon these accounts, the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases. But this we must refer to the ensuing book of these commentaries; only observing, for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution that, I may venture to affirm, has under Providence secured the just liberties of this nation for a long succession of ages."

Pursuing the same subject in the 4th book of his commentaries, in its application to criminal prosecutions, he characterizes it as the bulwark of the liberties of Englishmen; and affirms that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, must be confirmed by the unanimous suffrage of twelve of his equals and neighbors, and superior to all suspicion," before the accused can be subjected to any manner of punishment.

We have extracted somewhat at length from this eminent author, for the purpose of showing beyond controversy the number of the jury at common law, as well as the other essential elements of its constitution and action. The number must be twelve, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had.

We might cite other writers to the same purpose, but it cannot be necessary.

We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the Constitution of this State, intended to perpetuate, and make the safeguard of innocence, by securing its benefits to every person accused of crime, in any of its courts.

There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law, no person had ever been convicted of crime, by less than the concurring assent of twelve of his peers; and no law had ever attempted to authorize it to be done.

If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. The same constitutional provision that secures the right in a charge involving the life of the accused, secures it also in every other criminal case. It is no answer to say, that this would not likely be done. If it had been deemed safe to leave it to the discretion of the General

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Assembly, no constitutional provision was needed; but, whether needed or not, it has been ordained by a power which both the General Assembly and this court are bound to obey.

A moment's consideration will show that diminishing the number impairs the right, lessens the security of the accused, and increases the danger of conviction.

If corruption or prejudice are to be feared and avoided, they are much more likely to influence the conduct of six men than of twelve; and if the jury are honest, impartial, and pure, it is a self-evident fact, that the chances of a conviction upon conflicting evidence, by the unanimous approval of the larger number is many times less, than by the smaller. Nor is a conviction, even in cases to which this act extends, a matter to be lightly considered. The reputation and hopes of a man, and all those who stand connected with him, may be as effectually blasted by an unjust verdict of guilty, upon a charge of petit larceny, as for many crimes of much higher grade.

But, without pursuing these considerations further, our opinion is, that the essential and distinguishing features of the trial by jury as known at the common law, and generally, if not universally, adopted in this country, were intended to be preserved, and its benefits secured to the accused in all criminal cases, by the constitutional provisions referred to. That it is beyond the power of the General Assembly to impair the right, or materially change its character; that the number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void.

In coming to this conclusion, we have not referred to the decisions in other States, because we were entirely willing to take the responsibility of considering the question upon principle alone. The question has seldom arisen, but whenever it has, the same result has followed, without a single dissenting opinion or *dictum* to the contrary, so far as we are advised.

We have deemed it our duty to meet and arrest, at the outset, what we cannot but regard as an infringement of a great constitutional right; not in a very flagrant manner, but, nevertheless, opening the door to further encroachments. So far as the argument of convenience and expedition is concerned, we cannot do better than to reply in the language of Justice Blackstone: "However *convenient* these may appear at first, (as doubtless all arbitrary powers well executed are the most *convenient*,) yet let it be again remembered, that delays and little inconveniences in the forms of justice, is the price that all free nations must pay for their liberty in more substantial

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matters; that these inroads upon this sacred bulwark of the nation, are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern."

It would not be appropriate, nor do we intend to extend this opinion to determine the application of the right of trial by jury in civil cases. It is, however, well known that it never extended to all courts having civil jurisdiction, nor to the trial of all disputed facts.

The 5th section of article 13 has sometimes been referred to as containing, by implication, a warrant for supposing it was intended to authorize a jury of less than twelve, by the section of the Constitution which we have been considering. This section relates to the compensation required upon appropriating the right of way to the use of a corporation, authorized to construct a public improvement, and provides, that such "compensation shall be ascertained by a jury of twelve men, in a court of record as shall be prescribed by law."

Why, it is asked, fix the number here, if the term jury, used in other sections, *ex vi termini*, implies that number? The reason is obvious, and the answer plain. It had been held in *Willyard v. Hamilton*, 7 O. R. 115, pt. 2, that the value of property taken for public uses might rightfully be assessed by commissioners, it not being a case for trial by jury, secured by the Constitution; and that the proceeding need not be had in a court of justice. And the reason why it was not secured by the Constitution was, that it had never been so regarded in England or this country prior to the adoption of that instrument. This course of proceeding by commissioners, had been much complained of as unjust and oppressive to the owner of the property; and to make at once a proceeding within the protection of the Constitution, and to be pursued in a court of justice with a common-law jury, this fifth section of the thirteenth article was inserted, when the Constitution was revised.

It intended to afford the party the same protection as in other cases of jury trial; no more and no less; and if any inference is to be drawn from specifying the number of the jury, it is very strong evidence of the sense of the convention, that that was what had already been secured by the other sections, to suitors in other cases.

We do not intend to imply a doubt of the constitutionality of the act allowing juries before justices of the peace, composed of six men. Wherever facts are to be found in any proceeding, in which a jury was not required by the common law, a jury of any number may be authorized, within the discretion of the legislative body. Juries did not belong to these inferior courts at the common law, and so long

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as an appeal is provided for to the common-law courts from their determinations, it is clear no constitutional objection can arise, whether facts are found by the magistrate, or by the aid of a jury of any number of men. These questions were long since settled in *Emerick v. Harris*, 1 Binn. R. 416, and other cases in Pennsylvania.

The judgment must be reversed.

BARTLEY, J., dissented.

Although our selected case was determined under the provisions of the Constitution of the State of Ohio, and might therefore seem local in its character and importance, yet similar provisions concerning the right of trial by jury exist in the Constitution of the United States, and in that of most of the American States. The former provides, Art. 3, "The trial of all crimes, except in cases of impeachment, shall be by jury." Amendments, Art. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Art. VII. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Bill of Rights of Massachusetts declares, Art. XV. that in "all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to trial by jury." These and similar provisions in other States have their germ in Magna Charta, which declares, ch. 29, that "no freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."

Under these constitutional provisions, so generally prevailing, every person accused has a right to a trial by a jury of twelve men. The constitution is understood to mean by "jury trial," a common-law jury trial, with the essential features incident to such a tribunal, in number,

character, and unanimity. It is not in the power of any legislature, under such a constitution, to reduce the number, and subject a person to a final trial before a jury of less than twelve. And so of the provision above cited giving a right to the jury in cases of property above \$20 in value; this right cannot be taken away by any State law, or United States law. See *United States v. Rathbone*, 2 Paine, C. C. 578. Of course a law which secures a trial by jury on an appeal is no violation of the constitutional privilege, although it provides for a primary trial without the intervention of a jury. *Stewart v. Mayor of Baltimore*, 7 Maryland, 500, (1855); *Beers v. Beers*, 4 Connecticut, 535, (1823); *Morford v. Barnes*, 8 Yerger, 444, (1835).

Attempts have frequently been made by legislators to invest a body of six persons, called a jury, with power to try and convict persons charged with crime, and without giving the accused a right of appeal to a higher court, or a complete jury. But these attempts have always been set aside by the courts and the act providing them declared unconstitutional and void. One of the earliest efforts of this kind was in Arkansas, where an act was passed Dec. 16, 1846, giving to justices of the peace power to try certain offences, and authorizing him to impanel a jury of six persons, and that such trials "shall be by a jury of six men." This was held clearly contrary to the Constitution of that State, which provides that "the right of trial by jury shall remain inviolate." *The State v. Coz*, 3 English, 436, (1848). And see *Larillian v. Lane*, Ibid. 372, a civil case, in which it was held that the trial by jury is a great constitutional right, and when

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such a provision is incorporated into the Constitution, reference must have been had to the jury trial as known and recognized by the common law. And as no reference to the number is made in the Constitution, the conclusion is irresistible that the framers of the Constitution intended to require the same number. A similar construction was given to a somewhat similar act in New York, in *The People v. Johnson*, 2 Parker, 322, (1855). See also *The People v. Tynbee*, Id. 329, 562; *The People v. Fisher*, Id. 402; *The People v. Kennedy*, Id. 312; *Cruger v. Hudson River Railroad Co.* 2 Kernan, 198; *The State v. Moss*, 2 Jones, (N. C.) 66, (1854). A similar opinion was expressed by Redfield, C. J., in 6 Boston Law Rep. 26, (1853); and see also *Byrd v. The State*, 1 Howard, (Miss.) 177, (1835). The whole reasoning is based upon the position that the term "jury," uncontrolled and unexplained, imports, *ex vi termini*, a jury of twelve, impartially selected, who must unanimously concur in the decision. See also *Dixon v. Richards*, 2 Howard, 771, (1838); *Foote v. Lawrence*, 1 Stewart, 448, (1828); *Jackson v. The State*, 6 Blackford, 461, (1843); *Brown v. The State*, 8 Blackford, 561, (1847); *Doebler v. The Commonwealth*, 3 Sergeant

& Rawle, 237, (1817); *Dowling v. The State*, 5 Smedes & Marshall, 664, (1846).

But like any other right or privilege, the right of trial by twelve jurors may doubtless be waived by the person for whose benefit it was provided, and if he consent to be tried by a less number, their verdict would not be erroneous. See *United States v. Rathbone*, 2 Paine, C. C. 578.

But while any act diminishing the number of a jury, or altering any of its essential features, as dispensing with unanimity, would be clearly unconstitutional, yet it is otherwise of a law merely pointing out the mode of securing the trial by jury. Thus, although by the common law at the adoption of our Constitution, a person charged with a capital crime could challenge twenty jurors peremptorily, yet it has been held that a law reducing the number of such challenges to twelve was not unconstitutional, or an infringement of the sacred right of trial by jury. See *Dowling v. The State*, 5 Smedes & Marshall, 685, (1845). Neither is a law giving the government a right of peremptory challenge, unconstitutional. *Jones v. The State*, 1 Georgia, 610, 619, (1846).

E. H. B.

 THE CASE OF ALEXANDER KINLOCH AND CHARLES KINLOCH.¹

October 28, 1746.

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The court have power in a capital case to discharge a jury after they have been sworn and charged with the prisoner, without their giving any verdict; and if so discharged at the prisoner's request, he may again be put on trial.

PRESENT, Lord Chief Justice WILLES, Mr. Justice FOSTER, and Mr. Baron CLIVE; Alexander Kinloch and Charles Kinloch, who were the first of the prisoners concerned in the paper delivered the

¹ Foster's Crown Law, 16.

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2d of September that were brought to trial, were set to the bar ; and they agreeing in their challenges, one jury was sworn and charged with them by the clerk of the arraignments. The junior counsel for the crown opened the indictment, and the solicitor-general in a few words opened the evidence.

When the counsel for the crown had proceeded thus far, the chief justice, before any evidence was given, told the prisoners' counsel, that he was informed they had some objection to make in behalf of their clients, grounded on the Act of Union. Which objection, he said, was proper to be spoke to before the counsel for the crown went into their evidence. Whereupon Mr. Jodrell, one of the prisoners' counsel, stated his objection, and spake largely to it. The chief justice then said, that the objection, being in the nature of a plea to the jurisdiction of the court, could not be made on the issue of not guilty ; nor could any evidence in support of the objection be received upon that issue ; and therefore proposed that a juror should be withdrawn ; and that the prisoners should have leave to withdraw their pleas of not guilty, and to plead this matter specially ; and that the attorney-general might demur ; and so the point would come regularly before the court.

Mr. Justice FOSTER said on this occasion, that when he assured the prisoners they would have the full benefit of this objection on their plea of not guilty, he had no intention of leading them into a difficulty, which they could not get clear of, without the indulgence of the court. He thought they would be entitled *ex mero jure* to the full benefit of the objection, without such indulgence ; and added, that the principle he went upon was this, If there be any weight in the objection, it must be that the case of the prisoners is not within the act of the last session, under which act alone this special commission is executed. And if it be not within that act, it is a case at common law ; and consequently, taking it to be a case at common law, if no overt act be proved in the county where the commission sits, and whence the jury comes, the prisoners must of course be acquitted.

Sir John Strange, of counsel with the crown, strongly insisted, that in point of law the prisoners were entitled to the benefit of the objection on not guilty, if they could avail themselves of it ; and the attorney-general offered to waive all advantage that might be taken against the prisoners, if any advantage could be taken ; and pressed that the trial might go on upon the issue joined by them, and that the merits of the objection might be now considered.

But it was otherwise ordered. And a juror was withdrawn and

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the jury discharged upon the motion of the prisoners' counsel, and at the prisoners' request, and with the consent of the attorney-general. And the prisoners withdrew their former plea, in order that they might be ready the next day with their pleas to the jurisdiction in form. To which the attorney-general declared he would demur *instantanter*.

And the court adjourned to the next day.

The entry on the record touching this matter is as followeth :—

Upon the motion of Charles Hamilton Gordon, esquire, and ——— Jodrell, esquire, being assigned as counsel for the defendants in this cause, and by their consent, and also at the desire and request and by the consent of the defendants now at the bar here, and also by the consent of Mr. Attorney-General on behalf of the king, it is ordered by the court here, that Richard Foy, the last of the jurors sworn and impanelled in this cause be withdrawn out of the panel; and that the rest of the jurors in this cause be discharged; no evidence whatsoever having been given to the said jury in this cause, either on the part of the king or of the defendants. And it is further ordered by the court here, that the said defendants have leave to withdraw their pleas of not guilty by them formerly pleaded to the indictment in this cause, and have leave to plead to the jurisdiction of this court; and that the said defendants have time till to-morrow to put in such plea; and that they deliver copies of such plea to Mr. Sharpe, solicitor for the king in this cause, by eight of the clock this evening. And thereupon the said defendants do now here at the bar withdraw their said pleas of not guilty, in order to put in such plea to the jurisdiction of this court as aforesaid.

October 29, 1746. On this day, present the same judges as yesterday, Alexander Kinloch was first set to the bar and again arraigned, whereupon he tendered a plea engrossed on parchment and signed by his counsel, Mr. Gordon and Mr. Jodrell; to which the attorney-general demurred, and the prisoner instantly joined in demurrer.

And the said Alexander Kinloch in his own proper person comes, and having heard the indictment aforesaid read, and protesting that he is not guilty of the premises charged in the said indictment, for plea nevertheless saith, that he ought not to be compelled to answer to the said indictment; because he saith that the kingdom of Scotland, before and until the time of the union of the two kingdoms of England and Scotland, was regulated and governed by the proper laws and statutes of that kingdom, and not by the laws or statutes of the kingdom of England; and that ever since the said union of the said two kingdoms, that part of the realm of Great Britain called Scotland hath been, and yet is governed and regulated by the proper

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laws of that part of the said realm called Scotland, and not by the laws of that part of the said realm called England.

And the said Alexander Kinloch farther saith, that within the said kingdom before the union of the said two kingdoms, and until the said union thereof, and within that part of Great Britain called Scotland ever since the said union, there hath been and now is a certain court called the Court of Justiciary ; and that all and singular offences of high treason committed within the said kingdom of Scotland before and until the said union, and within that part of the realm of Great Britain called Scotland since the said union by the natives thereof, apprehended or taken for such offences there, (except peers of the realm of Great Britain) have been and of right ought to be inquired of, heard, and determined in the said Court of Justiciary before the justices of that court, or in some other courts or before other justices within the said realm of Scotland before the union, and within that part of the realm of Great Britain called Scotland since the said union ; and not in any courts or before any justices within the realm of England before the said Union, or within that part of the realm of Great Britain called England since the said union.

And the said Alexander Kinloch farther saith, that Fochabars in the shire of Murray, in the said indictment mentioned, the place where the said offence contained in the said indictment is supposed to have been committed, before and until the said union of the said two kingdoms, was within and parcel of the said kingdom of Scotland, and ever since the said union was and now is lying within and parcel of that part of the realm of Great Britain called Scotland.

And the said Alexander Kinloch farther saith, that he was born within that part of the realm of Great Britain called Scotland, to wit, at Fochabars aforesaid ; and that at the time when the said offence in the said indictment contained is therein supposed to have been committed, and long before that time, and since, he the said Alexander Kinloch was resident and commorant within that part of Great Britain called Scotland, to wit, at Fochabars aforesaid. And this he is ready to verify. Wherefore the said Alexander Kinloch prays judgment. If the court of our lord the king here will farther proceed upon the indictment aforesaid against him, and that he may be dismissed from the court here of and upon the premises, &c.

And the said Sir Dudley Ryder, knight, attorney-general of our present sovereign lord the king, who for our said present sovereign lord the king in this behalf prosecuteth, as to the said plea of him the said Alexander Kinloch by him above pleaded as aforesaid, for our said present sovereign lord the king saith, that the said plea and the matter therein contained are not sufficient in law to preclude the court here

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from their jurisdiction to hear and determine the high treason mentioned and specified in the said indictment, and above charged upon him the said Alexander Kinloch in and by the said indictment. Wherefore for want of a proper and sufficient answer in this behalf he prayeth judgment, and that the said Alexander Kinloch may answer in court here to our said present sovereign lord the king touching and concerning the premises aforesaid.

And the said Alexander Kinloch likewise.

The prisoner's counsel admitted, that his case is within the letter of the act of the last session by authority of which this court sits; but insisted, that by the known rules of construction, if any great or manifest inconveniences do arise from adhering closely to the letter of the act, the court ought, and always doth depart from the literal construction.

The construction they insisted on was, that for offences committed in England, commissions might issue for hearing and determining the same into any county of England; and for offences committed in Scotland, the like commissions might issue into any county of Scotland, which would, they said, answer all the ends of the act, mentioned in the preamble; and would at the same time avoid all the inconveniences which the construction contended for in behalf of the crown is attended with.

They then mentioned several inconveniences attending such a construction of the act; some of which might possibly have merited the attention of the legislature at the time the act passed.

Mr. Attorney-General in answer said, that the rules of construction as applied to acts of parliament grounded on inconveniences, whether imaginary or real, hold in no cases but where the meaning of the act is doubtful; in plain cases where the intention of the legislature is evident, it is the duty of the court to put the law in execution, and to leave all considerations of inconveniences to the legislature; and if the parliament had intended that different commissions should issue for the trial of treasons committed in England and Scotland respectively, they would have said so; they would not have empowered his majesty to issue commissions into any county or shire within the United Kingdom.

And the objection, he said, is not new; it was made, but without effect, in behalf of a Scotchman concerned in the rebellion of 1715.¹

¹ This was the case of *William Hay*, upon the special commission at Carlisle in the year 1716. The objection was then introduced, not by way of plea to the jurisdiction, but by demurrer. And the court, after hearing the prisoner's counsel, adjourned to the next day; and having considered the arguments of the prisoner's counsel, agreed

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The lord chief justice declared his opinion, in which the other judges present concurred, that the prisoner's birth, residence, and apprehension in Scotland, are facts perfectly immaterial to the present question; that they would have been so if the case had been at common law; for at common law every man is triable, not where he was born, resided, or was apprehended, but where the fact was committed; that these facts being immaterial, and the whole merits of the objection appearing on the face of the indictment, the prisoner might as well have demurred to it, as pleaded in the manner he hath done.

That in so plain a case as this is, arguments *ab inconvenienti* are of no weight; the law must take its course; inconveniences in plain cases are proper only for the consideration of the legislature.

His lordship observed, that the words, 'This realm,' occur in four or five places in the act, and that in every place where they do occur, except in the clause in question, they incontestibly mean the United Kingdom of Great Britain, and can mean nothing else; and by no rule of construction can they be restrained in this single clause to that part of the kingdom called England.

The court overruled the plea, and ordered that the prisoner should plead over to the treason, and he pleaded not guilty. Charles Kinloch was then brought to the bar, and being arraigned a second time on the indictment, pleaded likewise not guilty; and both prisoners agreeing to join in their challenges, a jury (the same persons who were sworn and charged with them yesterday) was sworn and charged with them. And they were both found guilty, but not executed.

November 15, 1746. On this day, present the two Chief Justices, Mr. Justice WRIGHT, Mr. Baron REYNOLDS, Mr. Justice ABNEY, Mr. Justice FOSTER, and Mr. Baron CLIVE; all the prisoners who were convicted since the last execution were brought to the bar to receive judgment. The two Kinlochs, Alexander and Charles, moved by their counsel in arrest of judgment; he took notice of the proceedings with regard to the prisoners on the 28th and 29th days of October, and insisted that their trial on the 29th (a jury having been sworn and charged with them on the 28th) was a mistrial, and the verdict a mere nullity.

He was proceeding to state his reasons and authorities, when Lord Chief Justice Lee interrupted him and said, That as there is a variety of opinions in the books touching that matter, which is really a point

to overrule the demurrer. Which being intimated to his counsel, he by leave of the court, and with the consent of the solicitor-general, withdrew his demurrer, and pleaded guilty.

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of great consequence, he thought it most advisable to postpone the farther consideration of it to the next adjournment, when he should desire the assistance of all the judges in the commission. Then the court, after passing sentence on the others, adjourned to the 15th of December.

N. B. The court being full, and the bar crowded in expectation of the event of this motion, Mr. Justice Foster thought it not improper to speak to the purpose he spake on the 28th of October; and he added, That, from what was said by the court on the 29th, he was confirmed in his opinion that the prisoners might safely have pleaded the general issue; for if, as was then admitted, the whole merits of the objection appear on the face of the indictment, the prisoners undoubtedly might have had the benefit of it in arrest of judgment. So that *quacunque viâ*, whether they could have been let into it on evidence (as they certainly might) or in arrest of judgment, they were not ill-advised in pleading the general issue.

December 15, 1746. On this day, present the two Chief Justices, the Chief Baron, Mr. Justice WRIGHT, Mr. Baron REYNOLDS, Mr. Justice ABNEY, Mr. Justice DENISON, Mr. Baron CLARKE, Mr. Justice FOSTER, and Mr. Baron CLIVE; Mr. Jodrell argued in behalf of the Kinlochs in arrest of judgment.

He admitted, that there is a variety of opinions in the books touching the power of the court to discharge a jury sworn and charged in a capital case; and that the practice, during the reign of King Charles the Second at least, went in favor of that power. But he said, that ever since the revolution the contrary practice hath uniformly prevailed; and even in the time of James the Second, the judges in *Lord Delamere's case*, 4 St. Tri. 232, declared, that a jury sworn and charged in a capital case cannot be discharged, but must give a verdict; and common justice, he said, requires, that when a prisoner is brought upon his trial, and a jury is once sworn and charged with him, he should stand or fall by the event of that trial; otherwise his life may be brought in jeopardy for the same fact as often as the court pleaseth, and even when he is not so well prepared for his defence.

To show that the law and practice before the restoration was with his clients, he relied on the authority of Lord Coke in his 1st Inst. 227 b, and 3d Inst. 110; and to show that the judges since the revolution concurred with Lord Coke, he cited Carthew, 465, where it is reported to have been said by Holt, at the sittings in Guildhall on the ninth day of November, 1698, in the case of *The King and Perkins*, "That all the judges of England upon debate among them-

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selves had agreed, that a jury sworn and charged in a capital case cannot be discharged, though all the parties consent to it."

He said, that he had seen a MS. note of the same resolution by the late Mr. Justice Tracy, which agrees in substance with Carthew's report of it.

He observed, that according to Carthew's report and Tracy's MS. the judges at the same time came to a resolution, that in criminal cases, not capital, a juror may be withdrawn or jury discharged by consent of all parties, but not otherwise.

That the practice since that time in criminal cases hath been conformable to this rule. For this he cited the cases of *The King* and *Morgan*, Hilary, 9 Geo. II., on an indictment for perjury, and *The King* and *Jelf*, Trinity, 7 Geo. II., Stra. 984, on an indictment for barratry; in both these cases Lord Hardwicke, he said, at the sittings refused to withdraw a juror at the prayer of the king's counsel, because the defendants' counsel refused to consent to it; and cited this resolution in Carthew. The use he made of these two cases was, that since this regard hath been paid to the authority of the resolution in criminal cases as reported by Carthew, he hoped the same regard would be now paid to that touching capital cases.

As to the matter of consent, he observed that consent may cure an irregularity, but cannot justify the breaking through any of the fundamental principles of law; especially such rules as are in favor of a prisoner who is answering for his life. A prisoner in this circumstance is hardly *sui juris*; he may be overawed or surprised into a consent, manifestly to his prejudice; and therefore the judges in the resolution cited from Carthew (on which he relied as an authority in point with him) threw the circumstance of the consent quite out of the case. Upon the whole, he concluded that judgment ought to be arrested.

To this it was answered by the counsel on the part of the crown, that, except the resolution reported by Carthew, there is not a single authority in the books which saith that a juror may not be withdrawn or the jury discharged, even in capital cases, with the consent of all parties. That it was done in the case of *Mansell*, so long ago as the 26th of Eliz., 1 And. 103, 104. And all the judges of Serjeant's Inn in Fleet street then agreed, that it might be done; and had often, to their knowledge, been done. That the rule laid down by Lord Coke in his first and third institutes runneth in general terms, and doth not indeed except the case of consent, but that case must be supposed to be excepted.

That it frequently hath been done since Lord Coke's time, even without consent, where the circumstance of the prisoner, or the de-

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mands of public justice, did require it. And for this they cited 2 Hale, 295, 296, 297; 1 Vent. 69; Kel. 26, 47, 52.

They said they did not cite these books with an entire approbation of the practice in *every* instance in which it prevailed; for some of the cases, particularly *Whitebread's*, 2 St. Tr. 827, ought never to be drawn into example; but only to show what the opinion of those times was.

That the opinion of the judges in Lord *Delamere's case* doth not affect the present question; for the only question proposed to the judges was, Whether in the trial of a peer in the court of the Lord High Steward the court might, after evidence given, adjourn the peers-triers from day to day. The judges did not presume to answer that question, it being a point of judicature, of which that court alone was the proper judge. But they did say, that, in the case of a common jury sworn and charged, they ought to give their verdict before they are discharged; meaning only that a jury in a capital case cannot be adjourned and separated after evidence given, but must be kept together till they agree on their verdict. The occasion which led them to say this sheweth, that the case of an adjournment was what they had then in contemplation, and not the case of a total dismissal of the jury; and so doth the reason they give for the practice; this, they say, is done for fear of tampering and corruption. In the case of a bare adjournment there may be room for this fear, but in the case of a total dismissal, when no verdict is to be given, there cannot.

They insisted on *Rookwood's case*, 4 St. Tri. 649, &c., as a case in point; for had the prisoner's counsel taken exceptions to the indictment coming within the restrictions of the act of the 7th of King William, and had those exceptions been allowed, the indictment must have been quashed, and the jury, though sworn and charged, must have been dismissed; and yet it cannot be imagined, that the quashing that indictment and discharging that jury would have discharged the prisoner from answering to the treason on a fresh bill of indictment.

As to the three resolutions reported by Carthew, the two last, they said, are manifestly against law, in the latitude laid down in that book. The king in a civil case may by his prerogative withdraw a juror, for he cannot be nonsuited; and it is frequently done in informations in the Exchequer on account of the revenue; and though the court refused to do it in the cases of *Morgan* and *Jelf* cited on the other side, yet in the case of one *Wilkinson*, Paschæ, 6 Geo. II., which was an indictment for misapplying money raised on the scavengers' rate, the court did discharge the jury at the prayer of Mr. Justice Abney, then one of the king's counsel, without the defendant's consent.

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It is objected, that a prisoner may be drawn into a consent to his own prejudice; but certainly a prisoner may do much more than consent, he may abandon all defence, he may plead guilty. He may on his trial waive all his challenges and put himself on the first twelve that shall appear. An accessory cannot be brought to his trial before the principal is convicted or outlawed; but if he pleaseth he may waive that privilege and submit himself to a trial, and it shall not be error because he consented. 2 Hale, 224. Besides, in the present case, what was done was at the prayer of the prisoners, and, as the court then took the case, manifestly for their advantage.

Cases may happen, where the court, *ex debito justitiæ*, and out of regard to the prisoner, ought to discharge the jury, and postpone the trial. The case put by Lord Hale, 1 Hale, 35, of a madman putting himself on his trial, is strong to this purpose; and other cases of the like kind may be put. On the whole they prayed judgment for the king.

Sir John Strange cited a record of Hilary 8 H. VII, Rot. 3, a copy whereof he brought into court. It was an indictment for murder, and not guilty pleaded. The jury, having heard all the evidence, withdrew to consider of their verdict, and being returned, delivered their verdict into court in writing; and being examined by the court how they came by that writing, confessed it was delivered into their hands by the prisoner at the bar as they passed by him. The court thereupon discharged the jury of the prisoner, and committed them for this misbehavior; and a new venire was awarded; and the second jury brought him in not guilty.

The arguments being long, and the day far spent, the court deferred giving their opinion to the 20th.

December 20, 1746. On this day, present the same judges as on the 15th, the court delivered their opinions *seriatim*. And all, except one, agreed, that judgment ought to pass upon the prisoners. They agreed, that admitting the rule laid down by Lord Coke to be a good general rule, yet it cannot be universally binding; nor is it easy to lay down any rule that will be so. The rule cannot bind in cases where it would be productive of great hardship or manifest injustice to the prisoner.

In the present case, the prisoners were advised upon their trial to object to the jurisdiction of the court; but having pleaded to issue, it was said that they were too late with that objection. In order therefore to let them into the benefit of this objection, liberty is given them, at their request, to withdraw their plea of not guilty, before evidence given, and to plead to the jurisdiction. Now the plea of not guilty being withdrawn, the jury had no issue to try, nor evi-

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dence before them, and must of course therefore be discharged; and consequently the prisoners have no right to complain of that which was a necessary consequence of an indulgence shown them by the court.

The judges who concurred in this opinion paid very little regard to the resolution reported by Carthew; not only for the reasons insisted on by the counsel for the crown, but because, as no other printed report of that time taketh any notice of this resolution, it is very doubtful whether there ever was any such resolution or not; especially since Mr. Baron Clarke informed the court that he hath a MS. report of the late Lord Chief Justice Eyre of the case of *The King and Perkins*, in which case Carthew supposeth Holt to have reported this resolution.

The case was thus, Perkins was indicted for perjury in an answer in chancery; the issue came on to be tried before Holt, at the sittings in Guildhall the ninth day, of November, 1698, when the bill was produced by the counsel for the prosecution, in order to entitle them to read the answer, it appeared that the bill had never been filed, so that neither bill nor answer could be read. Holt offered to stay till the prosecutors could send the bill to the office and have it filed. But they foreseeing that it could not be done in any reasonable time, their counsel insisted, on behalf of the crown, upon withdrawing a juror; Holt would not allow of it; and the defendant was acquitted.

Holt upon this occasion said: "I have had occasion to consider of this matter. In criminal cases a juror cannot be withdrawn but by consent; and in capital cases it cannot be done, even with consent."

This is the whole of the case, as reported by Eyre; not a word of any resolution of the judges on the point. And Holt's manner of expression, I have had occasion to consider, seemeth to imply that the opinion he gave was the result of his own thoughts on the subject.

With regard to Tracy's MS., it was observed by Mr. Justice Abney, that Tracy was not an English judge at the time the judges are supposed to have come to these resolutions,¹ or even so early as the year 1698; and therefore he must have taken up the matter upon report at second hand.

They all agreed, that the opinion of the judges in Lord *Delamere's* case doth not affect this question, for the reasons insisted on by the king's counsel; and joined in condemning the proceedings in the cases of *Whitebread* and *Fenwick*, as cruel and illegal.

The learned judge who dissented² admitted, that the discharging

¹ He was an Irish judge at this time.

² Sir Martin Wright.

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the jury in the present case was an instance of great indulgence towards the prisoners. But he thought it safer to adhere to the rule of law, which is clearly laid down by Lord Coke, than, upon any account, to establish a power in judges, which, it is admitted, hath been grossly abused, and may be so again.

He observed, that *Mansell's case* was the first, and, except the present, is the only case wherein the prisoner's consent appears to have been taken; and that the asking the prisoner's consent in *Mansell's case* plainly betrayeth a consciousness in the judges that the thing was irregular, and could not be done at the discretion of the court.

Cases, he said, have been put, where the circumstances of the prisoner seem to require that such a power should be lodged in the court; and other cases may be put where public justice seemeth to require the same. But these are particular and single inconveniences; and the policy of the law of England, and indeed the true principles of all government, will rather suffer many private inconveniences than introduce one public mischief.

He considered the trial by the same jury which is sworn and charged with the prisoner, as part of the *jus publicum*; as a sacred *depositum* committed to the judges, which they ought to deliver down inviolate to posterity; and concluded, that, the trial on the 29th being irregular, no judgment ought to be given on that conviction.

But judgment was given as in cases of high treason.

Mr. Justice FOSTER delivered his opinion in this case as followeth:

This case hath been very well argued at the bar; but the counsel on both sides went into the general question, touching the power of the court to discharge juries sworn and charged in capital cases, farther than I think was necessary.

The general question is a point of great difficulty, and of mighty importance; and I take it to be one of those questions, which are not capable of being determined by any general rule that hath hitherto been laid down, or possibly ever may be. For I think it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases which may come under this general question without manifest absurdity; and in some instances, without the highest injustice.

I therefore choose to consider the present question singly as it standeth upon the record, and to throw out of it every consideration that is foreign to it; and possibly, by so doing, most of the objections which have been made in the present case may receive this short answer, That they are levelled at an improper exercise of the power, but do not reach the present case.

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The question therefore is not, Whether a jury may be discharged after evidence given, in order to the preferring a new indictment better suited to the nature of the case; where, through the ignorance or collusion of the officer, or the mistake of the prosecutor, the fact laid varieth from the real fact, or cometh short of it in point of guilt.

This was frequently done before the revolution, and in one or two instances since.¹ Kel. 26, 52; Comb. 401. But this is not the present question.

Nor is the present question, Whether the court may discharge a jury sworn and charged, where undue practices appear to have been used to keep material witnesses out of the way; or where such witnesses have been prevented by sudden and unforeseen accidents. 1 Vent. 69.

This likewise is not the question, and I give no opinion on it; only let it be remembered, that Lord Chief Justice Hale, 2 Hale, 295, 296, 297, justifieth this practice, which, he saith, prevailed in his time, and had long prevailed, by strong arguments drawn from the ends of government and the demands of public justice.

Nor is it now a question, nor, I hope will it ever be a question again, Whether in a capital case the court may, in their discretion, discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict; and in order to bring the prisoner to a second trial, when the crown may be better prepared.

This was done in the cases of *Whitebread* and *Fenwick*, 2 St. Tri. 827, 828, and it was certainly a most unjustifiable proceeding. I hope it will never be drawn into example.

Nor is the present question, Whether the bare consent of the prisoner, unassisted by counsel, and consenting to his own prejudice, will render the court quite blameless in discharging a jury after evidence given on both sides and concluded.

This was done in the case of *Mansel*, 1 And. 103, which hath been cited at the bar; but I think it ought not to have been done; for, notwithstanding what the record saith of the uncertainty and insufficiency of the verdict, the truth of the case was no more than this: The jury were not agreed on any verdict at all; and therefore nothing remained to be done by the court, but to send them back, and to keep them together, till they should agree to such verdict as the court could have received and recorded; and the prisoner ought not to have been drawn into any consent at all; for in capital cases I think the court is so far of counsel with the prisoner, that it should not suffer

¹ See *Anne Hawkins's case*, *infra*, p. 355.

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him to consent to any thing manifestly wrong, and to his own prejudice.

I thought proper to premise these things, in order to clear the present question of every consideration which I take to be foreign to it.

And now I will state what I take to be the present question ; and that is,

Whether in a capital case, where the prisoner may make his full defence by counsel, the court may not discharge the jury upon the motion of the prisoner's counsel, and at his own request, and with the consent of the attorney-general before evidence given, in order to let the prisoner into a defence, which, in the opinion of the court, he could not otherwise have been let into.

And I am clearly of opinion, that a jury may in such a case be discharged ; and that the discharging the jury, under these circumstances, will not operate so as to discharge the prisoner from any future trial for the same offence.

It seems that an opinion did once prevail, that a jury, once sworn and charged in any criminal case whatsoever, could not be discharged without giving a verdict ; but this opinion is exploded in *Ferrar's case*, 1 Ray. 84, and it is there called a common tradition, which had been holden by many learned in the law.

My Lord Coke was one of those learned men who gave into this tradition, as far, at least, as concerneth capital cases ; and he layeth down the rule in very general terms, in the passages which have been cited on behalf of the prisoners from his first and third Institutes.

The same rule is laid down in Hale's Summary of the Pleas of the Crown ; a very faulty, incorrect piece, never revised by him, nor intended for the press.

But as his lordship in his History of the Pleas of the Crown justifieth the contrary practice, his authority is clearly on the other side of the question ; and his authority is the more to be regarded, because he had seen and well considered the passages cited from Lord Coke ; though I believe the rule, as it standeth in his summary, hath contributed not a little to the confirming many people in Coke's opinion.

My Lord Coke layeth down the rule in very general terms ; but he hath not given us any of the principles of law or reason whereon he groundeth it. He hath indeed, in his first Institute, cited one, and but one authority in support of it, and that authority doth not, to my apprehension, in the least warrant it.

A man was indicted for larceny, and upon his arraignment pleaded not guilty, and put himself upon the country ; and afterwards, when the jury was in court, he prayed the liberty to become an approver ; and this was denied him ; for when issue is joined, it ought to be

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tried. And he was tried and found guilty, and hanged. 21 Edw. III. 18.

This is the whole of that case. Here is not the least intimation given of any general principle, that a jury once sworn and charged cannot be discharged without giving a verdict; nor did the court, as I apprehend, go upon that principle. It went upon a principle quite different, a principle adapted solely to the case then before the court, which I shall mention presently.

Indeed Fitzherbert, who abridgeth this case, Corone, 449, doth say, that the reason of the judgment was, that the inquest, having been once charged, could not be discharged; which possibly might induce Lord Coke to draw the same conclusion from that case.

But the reason given by Fitzherbert is not the reason given in the book. Nor doth it so much as appear by the book, that the jury was sworn; the words of the book are "*Après quant l'enquest fuil icy,*" afterwards when the jury was here, or in court; whether sworn or not doth not appear by the book. But whether the jury was sworn or not, there was not the least occasion to resort to any general principle, that a jury once sworn cannot be discharged; because there was, as I hinted before, another rule at hand adapted to the case of an approver, which, I think, wholly governed that case.

And the rule was this; that a person who had once pleaded to issue could not after that be admitted to a confession in order to save his own life, by charging other persons supposed to be his accomplices in the same fact; for, by once solemnly denying the fact upon his arraignment, he had, in the opinion of those times, lost all credit, and so could not be received as an evidence against other people.

This rule is laid down by Staunford, Pl. Cor. 144, B., and it prevailed for a long time; and it is observable, that Brooke, Bro. Corone, 42, who abridgeth this very case, carrieth the reason the court went upon no farther than the law then went in the case of an approver; his words are: "A man was arraigned for felony and pleaded not guilty, and afterwards would have become an approver, and was not suffered, because he had joined issue before." Not because the jury was sworn and could not be discharged, but because he had, on his arraignment, denied the fact.

Thus, then, standeth the case with regard to the single authority cited by Lord Coke. The judgment did not go upon the general principle laid down by him and Fitzherbert, but upon a principle peculiar to the case of an approver.

It must be owned, that the judges did in after times abate of their rigor with regard to the case of approvers; and did admit persons to the liberty of approving, not only after issue joined, but even after

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the jury was sworn, and evidence in part given; but seldom after the evidence gone through and concluded; as appeareth from several instances mentioned by Lord Hale. 2 Hale, 228.

But then it must be owned, on the other hand, that whenever they did so, they went in flat contradiction to the general rule laid down by Coke and Fitzherbert.

I will only add, with regard to this point, that the admitting, or not admitting persons to become approvers, was always considered as a matter of mere discretion in the court; as a matter of grace, and not of right; and yet we see, that, in a matter of mere discretion, the court did frequently, upon the special circumstances of the case, discharge juries, after they were sworn and charged, and had in part heard the evidence.

These instances, therefore, must be considered as so many exceptions to the general rule; though, I confess, they do not come up to the case of discharging one jury, and bringing the prisoner to his trial by another.

But still they show, that the rule now contended for on the part of the prisoners cannot be true in the latitude the words import; and, I think, they do in part show, what I hinted in the beginning, that no general rule can govern the discretion of the court on this question in all possible cases and circumstances.

But this will appear in a stronger light in those cases where the circumstances of the prisoner appear on his trial to be such, as that the trial cannot proceed without manifest injustice to him.

A great variety of cases might be put upon this head; but as this is a point which ought to be treated with great caution, I think it safer to cite a case which I find stated to my hand, than to suppose and argue from any cases of my own.

The case I mean is that put by Lord Hale, which was mentioned the last time at the bar. 1 Hale, 35.

“In case a man in a frenzy happen by some oversight to plead to his indictment and put himself on his trial; and it appeareth to the court, on his trial, that he is mad; the judge, in discretion, may discharge the jury of him, and remit him to gaol, to be tried after the recovery of his understanding.”

But without resorting to authorities in a plain case, the common sense and feeling of mankind, the voice of nature, reason, and revelation, all concur in this plain rule, That no man is to be condemned unheard; and consequently no trial ought to proceed to the condemnation of a man who by the providence of God is rendered totally incapable of speaking for himself, or of instructing others to speak for him; and common sense will at the same time tell us, that the bare postponing a trial, under these circumstances, will not discharge

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the prisoner from a future trial, when his present disability shall be removed.

This case is surely an exception to any general rule that the wit of man can lay down on this point.

Another case, which I take to be an exception to the general rule contended for in behalf of the prisoners, is, when by the indulgence of the court, and the consent of the attorney-general, the trial of the issue goeth off after the jury sworn and charged; in order to entitle the prisoner to some advantage in point of defence, which in the rigor of the law he could not otherwise be entitled to.

And this, I apprehend, appeareth from the *case of Rookwood*, which also was cited at the bar. 4 *Rep.* Tri. 640, &c.

In that case the jury was sworn and charged, and the indictment opened by the king's counsel. The prisoner's counsel then offered some exceptions to the indictment, apprehending, as they said, that since the act of the 7th King Wm. declareth, that the exceptions therein mentioned shall not be taken after evidence given, the prisoner, by a favorable construction of the act, had liberty to take exceptions at any time before evidence.

The court was unanimously of opinion, that the prisoner's counsel had lapsed their time for taking any exceptions at all; that the proper time for taking exceptions is before issue joined, or at least before the jury sworn.

And yet it being a case of life, and on a new act of parliament, the court did agree that; in that instance only, the counsel should be at liberty, with the consent of the attorney-general, to take their exceptions; confining themselves to the exceptions mentioned in the act, of which they could not have the benefit in arrest of judgment.

The prisoner's counsel declined to enter into their exceptions under that restriction, and so the trial went on. But had exceptions under the restrictions of that act been taken and allowed, the indictment must have been quashed, and the jury then sworn and charged must have been discharged without giving a verdict.

Lord Chief Justice Holt did not come readily into the expedient, proposed by the rest of the judges, of letting the prisoner's counsel into their exceptions, even with the consent of the attorney-general; and in the conclusion declareth, that the attorney could not consent to it, unless he would also consent to discharge the jury.

These are his words, as I have taken them from the printed trial. His lordship surely at that time entertained no doubt, that at the prayer of the prisoner and his counsel, and with the consent of the attorney-general, a jury sworn and charged in a case of high treason might be discharged. The other judges present (who were the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and four

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of the puisne judges,) must certainly be of the same opinion; otherwise they would never have given way to the taking of exceptions, which if they had been allowed must have ended in discharging the jury, and at the same time could not, in the nature of things, have operated, so as to discharge the prisoner from answering to another indictment for the same offence.

It is said, on the authority of a very short and imperfect note in Carthew, that, in less than two years afterwards, all the judges of England, upon debate among themselves, came to a resolution, that in capital cases a juror cannot be withdrawn, though all parties consent to it.

It was very properly asked by the counsel for the crown, Upon what occasion this debate among the judges was had? Whether any case was then depending in judgment before them which gave rise to the conference, and which was to be governed by this resolution, and what were the particular circumstances of that case, if any such there was? These questions, I say, were very properly asked; for the true extent of all rules of this kind, however generally they may be penned, is, and always will be, in a great measure, adjusted by the circumstances of the case under consideration at the time when the rule appears to be given.

It seems, endeavors have been used to come at the necessary light in these particulars, but to no purpose; only it is said upon the authority of a MS. of a late learned judge, that this resolution, among others, was taken upon a conference among the judges in relation to an indictment against the then sheriffs of London for a bare misdemeanor; but what were the circumstances of that case, or what became of it doth not appear. And therefore, I freely own, this extrajudicial opinion (for with regard to capital cases it is extrajudicial) weigheth very little with me in the present question; and doth by no means shake the authority of *Rookwood's case*,¹ which I take to be a case very nearly in point with the present, and moreover was a case where the point did judicially come before the court, and in which the court had the assistance of very able counsel on both sides of the question.

The only difference between the cases is this; Rookwood could not have had the benefit of his exceptions without the indulgence of the court, and consent of the attorney-general; whereas the prisoners at the bar might, in my opinion, have had the full benefit of their point of law without either. I need not repeat what I said on this head the last time I spake of this matter. But as a doubt arose on

¹ See Holt's and Tracy's opinion in 1704, in the case of *Anne Hawkins*, at the end of this case, p. 355.

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that point, the expedient now under consideration was thought of. This expedient the court came into at the prayer of the prisoners and their counsel, and with the consent of the attorney-general.

Not to bring the prisoners' lives twice in jeopardy, (which is one great inconvenience of discharging juries in capital cases,) but merely in order to give them one chance for their lives, which, it was apprehended, they had lost by pleading to issue.

Nor was it done to postpone their trials to an unreasonable distance, when their witnesses might be dead, or wearied out by a long and expensive attendance, (which is another great inconvenience which may attend the discharging of juries at discretion, and was an ingredient of great hardship in the cases of *Whitebread* and *Fenwick*;) but in order to bring them to a trial with all the speed that might be, in case their plea should be overruled; and accordingly they were tried the very next day, as soon as judgment was given on their plea.

Upon the whole, my opinion is, that all general rules, touching the administration of justice, must be so understood, as to be made consistent with the fundamental principles of justice; and consequently all cases where a strict adherence to the rule would clash with those fundamental principles are to be considered as so many exceptions to it. The cases I have mentioned, and many others which might be mentioned, are exceptions to the general rule insisted on in behalf of the prisoners.

The case at bar is, I think, an exception to that rule; and at the same time standeth clear of the inconveniences mentioned by the prisoners' counsel.

The discharging the jury in this case was not a strain in favor of prerogative; it was not done to the prejudice of the prisoners; on the contrary, it was intended as a favor to them.

In that light, I say, it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney-General, with his usual candor, consented to it.

And in that light I know of no objection in point of law or reason to it. And therefore I am of opinion that judgment ought not to be arrested.

Mr. Justice Tracy's MS. having been cited in the foregoing case by the prisoners' counsel, and taken some notice of by the court, I think it not amiss to subjoin from the same MS., which I had not then seen, a report of the following case.

"At the sessions at the Old Bailey before Easter term, 1704, Anne Hawkins was indicted for breaking the mansion-house of Samuel Story in the night time. It appeared on evidence, that the house belonged to the African company, that Story was an officer of the

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company, and that he and many other persons as officers of the company had separate apartments in the house, in which they inhabited and lodged; and that the apartment of Story was broken open. It was holden by Holt, chief justice, myself, and Baron Bury, that the apartment of Story could not be called his mansion-house; because he and the others inhabit in the house merely as officers and servants of the company; and thereupon the jury was discharged of this indictment, and it was amended, and laid to be the mansion-house of the company." See Kel. 27; 1 Hale, 522, 557; Leach, 267.

The record hath been looked into. It warranteth the report of the learned judge in the substantial parts of it, though in some points it is defective. Two bills were in fact preferred against the woman, the first for burglary and larceny in the dwelling-house of Samuel Story, to which she pleaded and put herself upon the country. The second for burglary and larceny in the mansion-house of the African company, in which she is charged to have committed the burglary upon the same day, and to have stolen the very same goods as in the former bill.

It appeareth upon this second bill, that she was acquitted of the burglary and found guilty of the larceny; but it doth not appear by any entry on the first, that the court proceeded on it farther than the receiving and recording her plea, and remanding her to Newgate; probably till the second amended bill could be prepared and sent to the grand jury. But certainly it is more reasonable to impute this defect to the neglect of the officer who omitted to make the proper entry, than to imagine that the learned judge was totally mistaken in a plain matter of fact, falling within his own knowledge.

Another circumstance which may beget some doubt might be, and probably was, owing to mere accident. The first bill is now found upon the file among the indictments of the then next preceding sessions [March 8, 1703.] But it ought to be remembered, that neither Holt, Tracy, nor Bury attended at that time; and that it appeareth by the record that they all did attend at the following sessions; at which time, according to the judge's report, the point came under consideration upon evidence given on the first bill, and the second amended by the direction of the court was preferred.¹

¹ See the next case and note on the same subject.

Felony — Discharge of the Jury — Disagreement.

THE UNITED STATES *v.* JOSEF PEREZ.¹

February Term, 1824.

Felony — Discharge of the Jury — Disagreement.

The court may discharge a jury from giving a verdict in a capital case, without the consent of the prisoner, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated.

STORY, J., delivered the opinion of the court.

This cause comes up from the circuit court for the southern district of New York, upon a certificate of division in the opinions of the judges of that court. The prisoner, Josef Perez, was put upon trial for a capital offence; and the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner, or of the attorney for the United States. The prisoner's counsel, thereupon, claimed his discharge as of right, under these circumstances; and this forms the point upon which the judges were divided. The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts

¹ 9 Wheaton, 579; 6 Curtis, U. S. R. 194. From the report of the case in 2 Wheeler, C. C. 96, it appears that the jury were discharged after having been in consultation but four hours, they being then equally divided, and there being no prospect of ever agreeing.

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should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial. A certificate is to be directed to the circuit court, in conformity to this opinion.

CERTIFICATE. This cause came on, &c. On consideration whereof, it is ordered by the court that it be certified to the circuit court of the district of New York, that, under the circumstances stated in the record, the prisoner, Josef Perez, is not entitled to be discharged from custody, and may again be put to trial, upon the indictment found against him, and pending in the said court.

The Constitution of the United States, Amendments, Art. 5, declares that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Different opinions have been given whether this provision itself applies to proceedings in the State courts. See *The State v. Keyes*, 8 Vermont, 57; *United States v. Keen*, 1 McLean, 438; *The People v. Goodwin*, 18 Johnson, 201.

This however is immaterial, since a similar provision exists in nearly all the American States, and even where it has not the security of a constitutional guaranty, the principle is generally adopted as one fully established at common law. Thus Staunford says, (P. C. Book 2, p. 105,) "Home, per common leye, ne mittera sa vie deux fois in jeopardy de trial per un mesme felonie." And it is said by Blackstone, 4 Bl. Com. 335, to be a "universal maxim that no man is to be brought into jeopardy of his life more than once for the same offence." If the words of the Constitution should be thought to apply only to felonies, as has sometimes

been said, yet the common-law principle applies equally to all offences, whether of a high or low degree, and a plea of a former acquittal or conviction is as much a bar to a second prosecution for a misdemeanor as in case of the highest felony. See *Rez v. Taylor*, 3 Barnewall & Cresswell, 502.

It becomes, then, an important question to know when a person accused is, in the legal sense, "put in jeopardy." And it is clear he is so when a trial jury is impanelled and sworn to try his case upon a valid indictment, and such jury has been charged with his deliverance. By jeopardy of life is meant, said O'Neal, J., in *The State v. McKee*, 1 Bailey, 655, "where one is put upon his trial, upon a valid indictment, for a capital offence. It may result in his condemnation, and hence he is in jeopardy." See also *Weinzorpfm v. The State*, 7 Blackford, 191. "Where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation;" Tilghman, C. J., in *Commonwealth v. Cook*, 6 Sergeant & Rawle, 586. "Whenever a person shall have been given in charge on a legal indictment," says Hovey, J., in *Wright v.*

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The State, 5 Indiana R. 392, "and that jury is unnecessarily discharged, he has been once put in jeopardy, and the discharge is equivalent to a verdict of acquittal."

And in this country a jury may be said to be charged with a prisoner from the moment a full jury is impanelled and all have been sworn. *McFadden v. The Commonwealth*, 11 Harris, 12, (1853). From that moment his jeopardy begins.

It has sometimes been said that a person is not in jeopardy, in a legal sense, until the verdict of a jury is rendered for or against him. This was the opinion of Spencer, C. J., in *The People v. Goodwin*, 18 Johnson, 206, and Story, J., in 2 Sumner, 60. And other judges have said he was not in jeopardy until there has been a verdict, and also a judgment of the court upon it. *Dictum* of Washington J., in *United States v. Haskell*, 4 Washington, 402. But the fact that after a jury is once impanelled and sworn, even before verdict rendered, a prosecuting officer has no right to enter a *nolle prosequi*—a principle now everywhere acknowledged—shows that a prisoner is in jeopardy before the jury have been delivered of their verdict. And it is manifest that this last construction of the phrase "in jeopardy" will not materially aid us in the application of the rule, for even upon the construction of Spencer, C. J., there must be some exceptions to the rule, as where the indictment is fatally defective, or the verdict so imperfect that no valid judgment can be rendered upon it; in such cases, the prisoner can be tried again, having never been, as it is said, in one sense, in real jeopardy. It seems more natural, therefore, to put the construction upon this phrase, which is before given in this note, and to consider as exceptions to the rule all those cases where a person may be put a second time on trial.

If then a jury thus charged with a prisoner be discharged without giving a verdict, the offender having been once in jeopardy, cannot be again tried for the same offence, either on the same, or on a new indictment. Or, as expressed by Coke, 1 Inst. 327 b, "a jury sworn and charged

in a case of life and member, cannot be discharged by the court, or any other, but they ought to give a verdict." See also 3 Inst. 110.

But this rule, like all other rules, has its exceptions; one of which is necessity. Blackstone, 4 Bl. Com. 360, states the rule thus: "When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict." That necessity is the only ground for discharging a jury without the prisoner's consent, is obvious from the language of nearly all the judges, in cases where the question has arisen and been discussed. Thus, in *United States v. Coolidge*, 2 Gallison, 364, Judge Story says: "The power to discharge a jury in capital cases should be exercised only in very extraordinary and striking circumstances." In *The Commonwealth v. Cook*, 6 Sergeant & Rawle, 586, (1822,) Tilghman, C. J., said: "I grant that in case of necessity they may be discharged; but if there be any thing short of absolute necessity, how can the court, without violating the Constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?" Lord Denman, in *Regina v. Newton*, 3 Cox, C. C. 495, (1849,) said: "I admit that a necessity must be shown in order to justify the discharge of the jury, and in every case it is to be considered whether that necessity exists." In *The State v. Ephraim*, 2 Devereux & Battle, 166, (1836,) Ruffin, C. J., observed: "We think the jury cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and, generally speaking, such necessity must be set forth in the record." Chief Justice Spencer said in *The People v. Goodwin*, 18 Johnson, 205, (1820): "Upon consideration, I am of opinion, that although the power of discharging a jury is a delicate and highly important trust, yet, that it does exist in cases of extreme and absolute necessity." So in

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Commonwealth v. Fells, 9 Leigh, 620, (1838,) Upshur, J., said: "A prisoner is entitled to be tried by the jury selected, tried, and sworn in the first instance; and to deprive him of that right, except in case of obvious and strong necessity and propriety, might work great injustice and oppression to him, and endanger the pure administration of criminal justice." That necessity is the only cause justifying the discharge of a jury, and putting a prisoner again upon his trial, see also *Weinzorpflein v. The State*, 7 Blackford, 186, (1844); *Wright v. The State*, 5 Indiana, 290, (1854); *Mahala v. The State*, 10 Yerger, 536; *McCauley v. The State*, 26 Alabama, 135, (1855); *Nugent v. The State*, 4 Stewart & Porter, 79, (1833); *United States v. Haskell*, 4 Washington, 411, (1823); *Hines v. The State*, 8 Humphreys, 597, (1848); *The State v. Poage*, 3 Ohio State R. 239; *In re Spier*, 1 Devereux, 491; *Williams v. The Commonwealth*, 2 Grattan, 570; *Reynolds v. The State*, 8 Kelly, 60, where the cases are critically reviewed by Lumpkin, J.

But of course by "necessity" here is meant, not a physical necessity, not an absolute inability to take any other course, not an absolute impossibility to avoid discharging the jury, but merely — as said by Erle, J., in *Regina v. Newton*, 13 Queen's Bench, 734 — merely "need in a high degree;" or as elsewhere said, "highly convenient to all concerned in the trial, and highly conducive to the purposes of justice." And Foster, J., in the principal case says: "All general rules touching the administration of justice, must be so understood as to be made consistent with the fundamental principles of justice; and consequently all cases where a strict adherence to the rule would clash with those fundamental principles, are to be considered as so many exceptions to it."

Necessity certainly will justify a departure from the strict rule. It is a principle of the common law, as well as of common sense, that what becomes absolutely necessary in the course of legal proceedings must be done; *quod necessitas cogit, defendit*. And this brings us to consider what

facts and circumstances create this legal necessity for a discharge of a jury without the prisoner's consent; for of course they may be discharged with such consent, even in capital cases, and the prisoner may be tried again. *The Kinlocks' case*, ante; *Rex v. Stokes*, 6 Carrington & Payne, 151, (1833); *Regina v. Fitzgerald*, 1 Carrington & Kirwan, 201, (1843); *Regina v. Deane*, 5 Cox, C. C. 501, (1851); *Elijah v. The State*, 1 Humphreys, 103, (1839); *The State v. Slack*, 6 Alabama, 676, (1844).

And it would, of course, be impossible beforehand to state every case of necessity that would justify a jury's discharge, for, from the very nature of the case, it is some unforeseen event, some casualty, the exact character of which cannot be anticipated, much less defined. Some judges have attempted to enumerate all the cases of necessity which could warrant the exercise of so delicate and important a power, placing in such a category only such instances as have been already recognized as sufficient by direct adjudications; but it is evident such are only illustrations of the rule, without in any manner confining the rule to those particular cases. But as the nature and extent of the rule itself can be best understood by examining the instances in which it has been applied, or attempted to be applied, we proceed to state and examine them in the following order:

1. Sickness of the judge.
2. Sickness, incapacity, or misconduct of a juror.
3. Sickness of the prisoner.
4. Sickness or incapacity of a witness.
5. Insufficiency of evidence to convict.
6. Expiration of the term of the court.
7. Inability of the jury to agree.

1. *Sickness of the judge*. This occurred in Alabama some years since, in *Nugent v. The State*, 4 Stewart & Porter, 72, (1833). During the trial of a person for murder, and apparently after the jury were impanelled and sworn, but before any evidence was introduced, "the presiding judge was so extremely indisposed, as to render it impossible for him to preside; it was therefore ordered that the jury be discharged." For the prisoner at

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the second trial this discharge was relied upon as a defence, both at common law and under the declaration of rights of Alabama. But the court, after examining all the cases, adjudged otherwise, and although all the previous cases of necessity were occasioned either by the jury, the witness, or the prisoner, yet it was held there was no distinction in principle, between those cases and one where the judge should be taken ill and unable to progress with the trial. Indeed, the necessity for the jury's discharge would seem greater than in many other cases.

2. *Sickness, or other incapacity of a juror.* The leading case on this head is *The King v. Scalbert*, 2 Leach, 620, case 271, (1794). During the trial of the prisoner for murder one of the jurors was seized with a fit, and carried from the court in an insensible state. Another juror, who went to him and examined him, reported under oath that he thought he would not be able to attend the trial *immediately*. The jury were thereupon discharged, and another jury sworn, consisting of the former eleven and an additional one, and the prisoner was convicted. And this case was followed and approved by all the judges, eighteen years afterwards, in *Rex v. Edwards*, 3 Campbell, 207; 4 Taunton, 809; Russell & Ryan, C. C. 224, (1812). In this case, during a trial for a capital felony, one of the jurors was seized with a fit, and the surgeon attending him deposed that "he had been put to bed in a state of insensibility, and was incapable of returning into court that day." The same course was then adopted as in *Scalbert's case*, and the prisoner was convicted at the second trial. The same doctrine is supported by the cases of *The Commonwealth v. Merrill*, Thacher, C. C. 1, (1823); *Hector v. The State*, 2 Missouri, 135, (1829); *Mahala v. The State*, 10 Yerger, 532, (1837); *Regina v. Anderson*, 2 Moody & Robinson, 249, (1848); *Regina v. Leary*, 3 Crawford & Dix, 212, (1844); *The State v. Curtis*, 5 Humphreys, 601, (1845); *Regina v. Ashe*, 1 Cox, C. C. 150, (1845); *Fletcher v. The State*, 6 Humphreys, 249, (1845).

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And the same authority to discharge the jury exists, although the jury are not yet sick, if they have been so long confined as to endanger their health. The court are not bound to wait until the case has actually occurred. Not that the mere probability that confinement to the jury-room will produce ill effects on the health of some member of the jury will be sufficient to justify their discharge in advance; but when they have been a long time in consultation, and their confinement has produced serious effects upon the health of one or more of them, and longer confinement would probably produce worse consequences, the attempt to compel a verdict by longer confinement would be opposed equally to humanity and the sound principles of law and justice. *Commonwealth v. Fells*, 9 Leigh, 618, (1838); *The King v. Barrett*, Jebb, C. C. 103, (1829,) a case of conspiracy to murder; *The King v. Delany*, Ib. 106, a case of a capital felony. A noticeable instance of the discharge of a jury for illness of a juror occurred in *United States v. Haskell*, 4 Washington, 402, (1823,) where on a trial for a capital offence, the jury having been kept together three days, and more than twenty-four hours without refreshments, and there being no prospect of their agreeing, they were discharged by the court, who became satisfied that one of the jurors had become *insane* during the trial.

And in analogy with the case of illness or endangered illness of a juror, the General Court of Virginia thought it a good cause to discharge a jury, because, after having been together nine days without being able to agree, the wife of one of them was momentarily expected to be confined, and needed her husband's attentions. *Commonwealth v. Fells*, 9 Leigh, 618, (1838). *Sed quære*.

And on the same principle some courts have held that if a juror be ascertained, after the trial commences, to be not qualified by law to serve as a juror, he may be withdrawn by the court, on motion of the prosecutor, and *against the prisoner's consent*, and a new juror sworn in his place; a practice of course equivalent to dis-

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charging the whole panel and swearing a new one, including the former eleven, which seems to be the English practice in certain cases. Thus, in *United States v. Morris*, 1 Curtis, 23, (1851,) the defendant was on trial for a misdemeanor, and after the evidence was partly in for the prosecution, the court ordered a juror to be withdrawn, on motion of the district-attorney, and on proof introduced by him that the juror had a bias in the case, and the cause was continued to the next term, when the defendant being put again on trial pleaded the foregoing facts as a bar. Curtis, J., held the plea no bar, and said: "The rule of the common law is that neither party has a right of challenge, after the juror is sworn, for cause then existing. But it by no means follows that it is not in the power of the court, upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there. Suppose a prisoner on trial for his life should inform the court that a juror had been bribed to convict him, and that fact was unknown to him when the juror was sworn, is the court compelled to go on with the trial? Suppose the judge, during the trial, obtains, by accident, personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence, is he bound to hold his place? In my judgment, such a doctrine would be as wide of the common law as it would be of common sense, and common honesty. The truth is, that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make, their challenges, as well as to do almost every thing else in the course of a trial. As matter of right neither party can deviate from this order. And it is the duty of the court to enforce these rules which are for the general good. But there goes along with all of them the great principle, that being designed to promote the ends of justice, they shall not be used utterly to subvert and defeat it; being intended as a fence against disorder, they shall not be turned into a snare; they do not tie the hands of the court, so that when, in the sound dis-

cretion of the court, the public justice plainly requires its interposition, it may not interpose; and it would be as inconsistent with authority, as with the great interests of the community, to hold the court restrained. It is an entire mistake to confound this discretionary authority of the court to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case. I hazard nothing in saying, that no such right is known to the common law." See also *The People v. Damon*, 13 Wendell, 351, (1835,) where the fourth juror was found incompetent to serve after he had been sworn and taken his seat, but before the whole panel was made up, and he was withdrawn. So in *Stone v. The People*, 2 Scammon, 326, (1840,) the Supreme Court of Illinois held that a juror might be withdrawn from the panel against the prisoner's consent, after the evidence was partly introduced, because he was an alien, and by law incompetent to sit, but which fact was not known to either party when the trial commenced. But this is opposed to the earlier case in England of *Rez v. Sutton*, 8 Barnewall & Cresswell, 417, (1828,) although the application was made by the prisoner. See also *Poage v. The State*, 3 Ohio St. R. 239. How far a statute of Illinois may have influenced the decision in *Stone's case* it is not easy to say, but undoubtedly the general rule of the common law, elsewhere recognized, is, that all cause of objection to a juror, *propter defectum*, is waived by going to trial, and cannot then be raised, either by the prisoner or the prosecution. See *Wharton's case*, Yelverton, 24; Noy, 48; *The State v. Quarrel*, 1 Bay, 150, (1798) *The State v. Williams*, 3 Stewart, 454, (1831). Thus in *Regina v. Wardle*, Carrington & Marshman, 647, (1842,) on a trial for a felony, Erskine, J., after having conferred with Chief Justice Tindal, said they had no power to discharge the jury, because it was ascertained after the trial commenced, that the prisoner had a relative on the

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jury. See also *Regina v. Sullivan*, 8 Adolphus & Ellis, 831, (1838); *Rez v. Oates*, 10 How. State Trials, 1081. And in *Ward v. The State*, 1 Humphreys, 253, (1839,) a case of murder, after the jury had been sworn and the prisoner put upon his deliverance, the attorney-general challenged ten of the panel as not qualified jurors, and the court set them aside without the prisoner's consent, and directed him to select ten others, who in connection with the remaining two tried the prisoner, and returned a verdict of guilty. This was held erroneous, and such an error as could not be corrected by simply reversing and remanding the cause for further proceedings, because it would be impossible to place the prisoner in the same position he occupied when the jury was illegally broken up. The only remedy recognized was to discharge him. See also *McClure v. The State*, 1 Yerger, 219, (1829); *Gillespie v. The State*, 8 Yerger, 507, (1835); *Barlow v. The State*, 2 Blackford, 114, (1827); *The Commonwealth v. Jones*, 1 Leigh, 599, (1829).

On the other hand it has been held, somewhat in conflict with the foregoing views, that where an objection exists to a juror, as that he was one of the grand jury that found the bill against the defendant, and this fact is not known to the prisoner at the trial, and he could not with due diligence have ascertained that fact until after the jury were impanelled and sworn, he might then make the objection to the juror, if no evidence had been offered. *Dilworth v. The Commonwealth*, 12 Grattan, 689, (1853,) where all the cases, English and American, on this point, are ably reviewed by Daniel, J. In that case also the court thought, though this was not necessary to the decision of the cause, that the prisoner could raise the objection at any time before verdict rendered, and also that it could be raised at the instance of the commonwealth, for like cause, at any time, when the discharge of the jury without the prisoner's consent would not result in a discharge of the accused. This case was, however, decided by a divided court, three in favor, and two against granting a new trial.

Of course it is no cause for the discharge of a juror, after he is impanelled and sworn, and the trial has commenced, that he wishes to be excused, because he has a reluctance to convict any person of a capital crime. *United States v. Randall*, 2 Cranch, C. C. 412, (1823). But under this head of necessity caused by the jury, or some of them, is that arising from the absence of one of the jurors, who has left town wrongfully, thereby depriving the panel from rendering any verdict. A case of this kind is said to have occurred at the Hertford assizes, as early as the year 1640. 2 Hale, P. C. 296. And again in *The State v. Hall*, 4 Halsted, 256, (1827). That was a case merely of assault and battery, but the reasoning of the court applies equally to all offences.

3. *Sickness of the prisoner.* The earliest reported case on this point is *Elizabeth Meadow's case*, Foster, C. L. 76, (1750). There the prisoner, during her trial for larceny in a dwelling-house, was seized with the pains of labor, and the court ordered her back to Newgate, and discharged the jury. And to the same effect is *The King v. Stevenson*, 2 Leach, 546, case 246, (1791). The evidence in a trial for larceny was nearly closed on the part of the crown, when the prisoner was suddenly seized with a fit, which rendered him incapable of being again brought to the bar for trial. The jury were discharged, and the next morning the prisoner was tried again and convicted by an entirely different jury. See also *Rez v. Streek*, 2 Carrington & Payne, 413, (1826).

And in such a case, the prisoner being by his sudden illness incapacitated from managing his defence, his consent, or even request, to the jury's discharge may be fairly implied, and the exercise of the power to withdraw the case from the jury might well be vindicated on that ground alone. For that a prisoner's own request is sufficient reason to authorize a jury's discharge, is abundantly clear as held in the principal case, *Kinlochs' case*, ante. And, having requested it, the prisoner cannot of course raise any objection to a trial by another jury, and the prosecutor

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cannot object, since no right of exception, new trial, or appeal is, at common law, ever allowed the government in a criminal case. But the discharge of a jury because of the sickness of the prisoner, although not necessary in the same sense as in other cases, yet is necessary in another, since it is erroneous to try a person charged with a felony in his absence, and therefore the trial ought to be postponed. See *Sperry v. The Commonwealth*, 9 Leigh, 623, post, and note.

4. *Sickness or other incapacity of a witness.* The attempt has sometimes been made to establish the sudden illness of a material witness summoned for the prosecution a ground for withdrawing the case entirely from the jury, and sending it to a different panel. Thus, in *Rex v. Kell*, 1 Crawford & Dix, 151, (1803,) the prisoner was on trial for a rape. The female witness appeared in a very delicate state of health, and greatly agitated. A physician who examined her reported it as his opinion, that if she were then to give her testimony, her life might be endangered. Upon this the jury were discharged, and the twelve Irish judges were of opinion that the prisoner could not be again tried. And the case is cited with much approbation by Perrin, J., in *Conway v. The Queen*, 7 Irish Law R. 162, (1845). Whether the sudden illness of a witness might not be good cause for postponing a trial for a reasonable time, is another and a different question. See *Commonwealth v. Wade*, 17 Pick. 399; *Dictum*. The power of the court to adjourn a case on trial, even a capital case, is now perfectly well settled, at common law, whatever the old authorities and practice might have been. Accordingly we find that in *The United States v. Coolidge*, 2 Gallison, 364, Judge Story postponed a trial because a witness refused to be sworn. This case is sometimes cited as an authority for discharging a jury altogether, because a witness refuses to testify, but the printed report merely states that the court ordered the trial to be postponed. It is not good cause for discharging a jury, that a material witness called for the government is not sufficiently acquainted with the nature and

obligation of an oath to testify. *Rex v. Wade*, 1 Moody, C. C. 86, (1824); *Regina v. Oulaghan*, Jebb, C. C. 270, (1839).

5. *Insufficiency of the evidence to convict.* Although Lord Hale says, 2 Hale, P. C. 295, that "nothing is more ordinary than after the jury are sworn, and charged with a prisoner, and evidence given, yet if it appears to the court that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, the court may discharge the jury of the prisoner, and remit him to the gaol for further evidence;" and although some instances may be found where such a course was followed, (2 State Trials, 710, 827; *Kelynge*, 26, 47, 52; Sir T. Raym. 84; Hob. 295,) yet such a practice is certainly not sustained by the common law of England. *Kinlochs' case*, ante; *Rex v. Jeffs*, 2 Strange, 984, (1734); *The People v. Barrett*, 2 Caines, 305, (1805); *The People v. Goodwin*, 18 Johnson, 206, Spencer, C. J.; *Hacker v. The State*, 8 Blackford, 540, (1847); *United States v. Shoemaker*, 2 McLean, 114, (1840).

This point was fully considered in a late case before the Supreme Court of New York, *Klock v. The People*, 2 Parker, 676, (1856,) where on a trial for a felony, the defendant objected to certain testimony offered by the prosecution, on the ground that a certain fact sought to be established could be proved only by record testimony. The testimony offered was excluded by the court on this objection, and the prosecuting attorney, not being prepared with the necessary evidence, moved the court to withdraw a juror, and discharge the panel, which was done, against the objection of the defendant. Being brought up again for trial, the defendant set up the foregoing facts in bar, which were held sufficient by the court, not so much because of the constitutional provision that no person should be twice put in jeopardy of life or limb, but upon the principles of the common law, which were designed to secure the full and fair protection of individuals accused of crime, and to secure to them a speedy and impartial trial, and the best means of indicating their innocence. And the right to

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subject a prisoner to a *second* trial, because of defective testimony, would imply the right to a *series* of harassing trials until a conviction could be obtained.

The untenable distinction between felonies and misdemeanors once led the Supreme Court of North Carolina to hold, that on a trial for feloniously receiving stolen property, a juror could be withdrawn, against the prisoner's consent, after all the evidence for the prosecution had been introduced, it being then found that the alleged thief himself had not been tried, and therefore, as the court said, the receiver could not be convicted. And the court said that the rule in misdemeanors was, that the court might withdraw a juror when, in its discretion, it judges it necessary to the ends of justice, and that the Superior Court could not interfere with any exercise of this discretionary right. *The State v. Weaver*, 13 Iredell, 203, (1851). But this is clearly erroneous, as is also the case of *The People v. Ellis*, 15 Wendell, 371, (1836) in which it was held that where a prisoner was on trial merely for a *misdemeanor*, it was in the discretionary power of the court, after part of the evidence was in, to withdraw a juror, on motion of the prosecutor, and against the prisoner's consent, and put him to another trial. And this was deduced from the power of the court to discharge a jury in civil cases, but the analogy clearly fails. If the Constitution of the United States, forbidding a person to be twice put in jeopardy, does not apply as well to misdemeanors as to felonies, the principles of the common law certainly do, and the language of Story, J., in *Perez's case*, that the court may discharge a jury whenever in their opinion "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated," must be taken with the necessary allowance.

6. *Expiration of the term of the court.* If the length of the term of the court be fixed by law, and the time of adjournment has arrived, it would seem difficult to conceive of a stronger ground of necessity for a discharge of a jury, whether they were or were not then in deliberation on the case of a person accused. In one sense,

the powers of the court are then at an end, and however the jury may then be engaged, they are entitled to be discharged. Indeed they can be obliged to stay no longer. And although a rigid adherence to the rule that a jury charged with a capital case cannot be discharged unless they have agreed, has led one court to decide, that if discharged because the time of adjournment had arrived, the prisoner could not be tried again; *Spier's case*, 1 Devereux, 491, (1828); and see *The State v. Garrigues*, 1 Haywood, 241, (1795); yet elsewhere such an occurrence has quite generally been conceded to be a case of necessity, and that the prisoner could again be put upon trial, without violating any of his common-law or constitutional rights; see *Rez v. Shields*, 28 How. St. Tr. 619, (1802); *The State v. Brooks*, 3 Humphreys, 70, (1842); *The State v. Moor*, 1 Walker, (Misa.) 184; *Commonwealth v. Olds*, 5 Littell, 138, (1824); *Ned v. The State*, 7 Porter, 168, (1838); *Lore v. The State*, 4 Alabama, 173, (1842); *The State v. Battle*, 7 Alabama, 259, (1845); *Mahala v. The State*, 10 Yerger, 532, (1837); *The State v. McLemour*, 2 Hill, S. C. 680; *The People v. Thompson*, 2 Wheeler, C. C. 472, (1813). Indeed, in such a case, a jury may be said not to be discharged by the judge in the exercise of any discretion vested in him, but rather discharged by law. If, however, provision is made by law for the continuation of the court in the event that a capital cause is on trial, as is the case in some American States, it has been thought no cause to justify a jury's discharge, that they had not agreed when the *usual* time for the adjournment of the court had arrived. See *Wright v. The State*, 5 Indiana, R. 290, (1854).

Newton's case, 13 Queen's Bench, 716, (1849,) better reported in 3 Cox, C. C. 489, is an important case on this head of necessity, being the deliberate judgment of the full bench, after a learned and full argument of the question, and the examination of all the English authorities. The prisoner had been committed to jail by a warrant from a justice of the peace for wilful murder. Being indicted, her trial

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commenced on the 21st March, and about two o'clock on the 22d the jury retired. They were locked up all night in deliberation, and came into court on the 23d, about eight o'clock, and stated they had not agreed, and were not likely to agree, as they were equally divided. This was the last case to be disposed of in that county, and the judge was obliged to go that day to the next county on the circuit, to hold the court there. He therefore discharged the jury, and remanded the prisoner to gaol. She applied for a *habeas corpus* to obtain her discharge, on the ground that the discharge of the jury under the circumstances was equivalent to an acquittal, and that she could not be held for another trial. The actual *decision* of the case was on a different point from that now under discussion, namely, that she could not be discharged on that application, because the original warrant of commitment from the justice of the peace had not yet spent its force, and she was rightfully held on that warrant, whether the jury were or were not rightfully discharged. But the court said that the jury were rightfully discharged, mainly, it seems, because the duty of the court was over at the county of the trial, and the judge was obliged to be present elsewhere on the same day. And they distinguished *Newton's case* from *Conway v. The Queen*, on that ground. "We are not pressed," said Coleridge, J., "by the decision in that case, for the very fact, that it was the last day of the assizes, was wanting in that case, but the absence of that fact was relied upon as a main ground of the judgment." And Patteson, J., said: "I think that the fact of the business being finished, and the judge about to leave the county, distinguishes the present case from that of *Conway and Lynch v. The Queen*, as that actual necessity, which the majority of the judges in that case thought to be required, has here arisen."

7. *Inability of the jury to agree.* And it is evident that this occasion for the exercise of the power to discharge a jury differs in some respects from any before cited. For here is no casualty, no sudden, un contemplated, and unforeseen exigency, which could not be guarded against, but it

is one of the events incident to a trial by jury; it arises out of the very nature of the tribunal who alone by law can pass upon the guilt or innocence of the accused. Their disagreement may indeed be rather expected than otherwise in many cases. The fortuitous character of the occasion for a discharge, found to exist in all the other instances given, here seems wanting. But it is said that as in the case of the sickness of a jury, there is a physical necessity for their discharge, so in case of their disagreement, there is a *moral necessity* for the same course. The *necessity of doing justice* is said to be a higher necessity than any other. But on the other hand it is argued that there it is not necessary or useful to public justice, that courts should possess the power of discharging a jury for their disagreement; for if twelve men indifferently chosen, after full argument upon the evidence, and instruction from the court upon the law, and opportunity for full deliberation, be not agreed of the guilt of the accused, he ought to be acquitted. The law, it is said, anticipate a verdict in every case; and although, from the constitution of the human mind, it cannot be supposed that the evidence will make the same impression upon every juror, yet it is probable that by consultation they will ultimately come to the same conclusion; and if to no other result, that the whole jury, upon the fair and invincible doubts of a part of their body, will adopt a view favorable to the accused, since in case of real doubt the law inclines to the presumption of innocence. There is, on that view, no foundation for the notion of a moral necessity for the discharge of a jury on account of a moral disability on the part of the jury, to make up their minds alike, and agree on a verdict after a reasonable period for consultation.

And what distinction exists, it has been asked, between discharging a jury immediately after the evidence is in, because there is not sufficient evidence to convict, which all admit cannot be done, and discharging them several hours afterwards because they say they cannot agree? In both cases the jury are discharged for the same cause, because the evidence is not

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sufficient to convict. The result to the prisoner is the same in each case. The prisoner is to be tried again, when the government may be better prepared.

This interesting question becomes still more so from the great conflict of opinions and decisions to be found in adjudged cases upon it; a conflict which calls for a somewhat careful discrimination. And in the first place it may be assumed that nearly all the cases agree that if the jury have been kept so long together as to endanger their health, or if the term of the court is about to expire, the court have power to discharge them, and remand the prisoner to a new trial; and that this may be done both in capital cases and in misdemeanors. Thus, in *The Commonwealth v. Cook*, 6 Sergeant & Rawle, 577, (1822) — the leading case in this country against discharging a jury for their alleged inability to agree — Tilghman, C. J., said: "A case may arise in which a jury may find great difficulty in agreeing, and some of them may be so exhausted as to put their health in danger. The moment it is made to appear to the court that the health of a single juror is so affected as to incapacitate him to do his duty, a case of necessity has arisen, which authorizes the court to discharge the jury." See also *The Commonwealth v. Clue*, 3 Rawle, 498, (1831). And Goldthwaite, J., uses nearly similar language in *Ned v. The State*, 7 Porter, 213, (1838,) which follows the lead of *Cook's case*. The reason for such a conclusion is obvious. For of course if the jury are either mentally or physically unable to discharge their functions, to reason, to compare, to persuade, and convince their associates, then from whatever cause this disability may arise, there is "the highest need" for their discharge.

But there are a number of well considered cases, which after much deliberation, and careful examination of the whole question, declare that a judge has no authority to discharge a jury merely because they say they cannot agree, and have been kept together a reasonable time for that purpose.

In *The Commonwealth v. Cook and others*, 6 Sergeant & Rawle, 577, (1822,) the

earliest case in this country on this side of the question, three prisoners were on trial for murder, and the jury, after being out about fifteen hours, and having in that time returned to the court several times without having agreed, finally said they had agreed as to two, (but not mentioning which two,) but there was no probability of their agreeing as to the third. The court refused to receive the verdict as to either prisoner, and discharged them. The prisoners were all arraigned on a new indictment for the same offence, and pleaded a special plea in bar, setting forth the former trial, etc. To this plea the prosecuting officer demurred, but the plea was held good. Now, as to this case, one remark may be made, that the decision was undoubtedly correct, because the former jury having agreed as to two of the three prisoners, the verdict as to them ought certainly to have been received, (*The Commonwealth v. Wood*, 12 Massachusetts, 313; 2 Johnson's Cases, 301,) but the former jury not having specified as to which two of the prisoners they had found a verdict, there was on the second trial no legal method of determining that fact, and each of the three, when on trial the second time, might claim that he was one of the two for whom the former jury had agreed. Under such circumstances, it would have been quite impossible to order either of the three to a second trial without the hazard of exposing one of those whom the former jury may have agreed to acquit. There would, therefore, be no certainty of avoiding injustice but by determining that neither of the three should be subject to a second trial. This would have been quite sufficient for the determination of the case, but the court proceeded to say, that the circumstances in that particular case did not show any necessity for the discharge of the first jury, and gave their reasons at much length. And this was followed in the same court by *The Commonwealth v. Clue*, 3 Rawle, 498, (1831,) a trial for murder, in which Gibson, C. J., observed: "Why should it be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate, for the enforce-

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ment of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offence. If discretion is to be called in, there can be no remedy for the most palpable abuse of it, but an interposition of the power to pardon, which is obnoxious to the same objection. Surely every right secured by the Constitution is guarded by sanctions more imperative. But in those States where the principle has no higher sanction than what is derived from the common law, it is nevertheless the birth-right of the citizen, and consequently demandable as such. But a right which depends upon the will of the magistrate is essentially no right at all; and for this reason the common law abhors the exercise of discretion in matters that may be subjected to fixed and definite rules. Nor do I understand how a prisoner shall be said not to have been in jeopardy before the jury have returned a verdict of acquittal. The argument must be that he is not put out of jeopardy unless by a verdict of acquittal; and that to try him a second time, having remained in jeopardy all along, is not to put him in jeopardy twice. But this argument is an assumption of the whole ground in dispute." Judge Washington, also, in *United States v. Haskell*, 4 Washington, 411, said: "We agree with *Cook's case* that a judge ought not to discharge a jury merely because they say they cannot agree, however positive the declaration may be." The Supreme Court of North Carolina have with much deliberation and with great weight of reasoning adopted and repeatedly acted upon the same principle in case of felonies. See *The State v. Ephraim*, 2 Devereux & Battle, 162, (1836); *The State v. Slaughter*, cited *Id.* 170, decided in 1830, after an elaborate argument, and an examination of every authority. Ruffin, C. J., said: "I am delegated to pronounce our unanimous opinion, founded upon very deliberate consideration, that the prisoner cannot be tried again, but is entitled to his discharge, in the same manner as if he had been acquitted by the jury. In the case of *Perez*, 9 Wheaton, 579, *ante*, 357, besides others in several of the State

courts in this country, the power of the court, in its discretion, to discharge the jury, is certainly recognized in its greatest extent; and it was upon the authority of these cases, zealously contended for by the attorney-general, in this case; but we are all of opinion that there is no such discretionary power in a case of felony, known to the common law of England in its ancient purity, nor as administered in the more modern times of an independent judiciary; and that nothing short of an apparent, flagrant, and uncontrollable necessity would justify such discharge, and authorize a second trial. Although the doctrine of this discretion has been thus promulgated by some of the American courts, it is remarkable that not a single instance of its exercise or assertion can be found in the English books, since a period was put to an arbitrary prerogative and judicial servility, by the expulsion of the Stuarts. Since the revolution in 1688, a jury has not been discharged in that country, except upon an absolute disability of the prisoner to conduct his defence; as, if he became insane, or suddenly ill during the trial; or from the inability of the jury from like causes to proceed in the trial; or other similar physical necessity and dispensation of Providence, except it be on the side of mercy, for the benefit, and at the request, or at least by the consent of the prisoner, as in *Kinlochs' case*, Foster, 16, *ante*." Still the same court allow this right in cases of *misdemeanors*, fully approving the case of *The People v. Alcott*, 2 Johnson's Cases, 301. See *The State v. Morrison*, 3 Devereux & Battle, 116, (1838); *The State v. Weaver*, 13 Iredell, 283, (1851).

The Supreme Court of Tennessee in 1837, in *Mahala v. The State*, 10 Yerger, 532, fully adopted the rule of the Pennsylvania cases. The defendant was on trial for murder, and the jury retired to deliberate about two o'clock, P. M. They came into court several times in the afternoon, declaring they could not agree, but they were sent back, and kept together all night. About nine o'clock next morning, having coming into court, they informed the judge "it was impossible for them

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ever to agree," whereupon they were discharged; but such discharge was afterwards held erroneous, and that the prisoner could not be tried again. "The reasoning of the case in Pennsylvania, say the court, is to our minds entirely satisfactory. If a moral impossibility for a jury to agree, without being attended with some physical impossibility, constitutes a case of necessity, it is manifest that the decisions of the inferior court can never be reversed. How can the superior court know whether the jury could have agreed or not, and how long shall the inferior court be compelled to keep the jury together, before it shall be warranted in saying, that they cannot possibly agree? Shall it be an hour, a day, a week, or a month? Upon the whole, the power of discharging a jury, against the consent of the prisoner, is of such a dangerous character, that we hesitate not in saying that it should not be exercised by the courts, when the jury cannot agree on a verdict; unless they be prevented by a physical impossibility, and that when such impossibility does exist, the jury should be kept together until the court is about to adjourn, when of necessity they must be discharged."

The State of Alabama in the following year yielded to the same doctrine in the elaborately considered case of *Ned v. The State*, 7 Porter, 187, (1838). That was also a case of murder. The jury were discharged after having been in deliberation for thirty-six hours. On a writ of error to reverse the judgment rendered on a subsequent trial, the court examined the authorities at much length, and concluded that "a court does not possess the power in a capital case to discharge a jury because they cannot, or will not agree." See also *McCauley v. The State*, 26 Alabama, 135, (1855). There must be some weight in the reasoning on this side of the question, since Virginia also, in a late case, in the full light of all the opposing decisions hereafter cited, declared that in *felonies* mere inability of the jury to agree did not authorize their discharge. *Williams v. The Commonwealth*, 2 Grattan, 567, (1845). Although in that State a different rule

prevails in cases of misdemeanors. *Dye v. The Commonwealth*, 7 Grattan, 662, (1851). It is not easy, however, to see any satisfactory distinction between felonies and misdemeanors in this respect.

The Irish courts have very carefully examined the same subject, and have held, relying solely upon the common-law principle before cited, that the court ought not to discharge a jury in a capital trial *merely* because they have been, in the opinion of the judge, a reasonable time in deliberation, and have not agreed, and say they cannot agree. *Rex v. Leary*, 3 Crawford & Dix, 212, (1844); *Conway v. The Queen*, 7 Irish Law R. 149; 1 Cox, C. C. 210, (1845). This is the fullest and most carefully considered case on this question to be found on either side of the Atlantic, and Lord Denman in *Regina v. Newton*, 3 Cox, C. C. 495, alluding to this case, said: "The Court of Queen's Bench in Ireland is a great authority, and the case in that court was decided upon much consideration, and after full resort to all the cases, which are discussed with much learning." The Irish case was, however, determined by a divided court, Crampton, J., dissenting in a very able judgment.

The ancient practice of carrying a jury around with the judges until they could agree, tends to show it was not considered discretionary with the courts to discharge them because they were not agreed. Some elementary writers speak of the practice of carrying juries around in a cart until they agree, as a mere tradition of the common law, or as a mark of ignominy and disgrace, a species of punishment for their contumacy in refusing to agree; but it is more reasonable to suppose, considering the deep attachment of the English people to the trial by jury, and their probable unwillingness to see the right brought into contempt, that the custom arose from a jealous regard for the preservation of the right, and a want of power in the court to abridge the right. That such was the actual practice, we have the authority of Lord Hale: "If they agree not before the departure of the justices of gaol delivery into another county, the sheriff must send them along in carts,

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and the judge may take their verdict in a foreign county." 2 Hale, P. C. 297. And in *The King v. Ledgingham*, 1 Ventris, 97; T. Raym. 193; 2 Keble, 687, (1640); it was said that "in cases of life and member, if the jury cannot agree before the judges depart, they are to be carried in carts after them, so they may give their verdict out of the county." And the verdict in that case was in fact received by the court in a different county from the place of trial. And this practice of carrying a jury about in a cart does not appear to be entirely obsolete, for as late as 1828, Gaselee, J., told the jury in *Morris v. Davies*, 3 Carrington & Payne, 380, "I might in an ordinary case take you in a cart to the bounds of the county, and there discharge you, but I think it right to state to you the grounds of my discharging you now." This was said at the assizes for Gloucestershire, which is the last county in the Oxford circuit, which was the reason why the judge spoke of discharging the jury at the bounds of that county. For, as well known, on the circuit the judges had but one commission of assize and nisi prius, and one commission ofoyer and terminer for their whole circuit, although their commissions of gaol delivery were separate for each county. If therefore the jury disagreed in the first county on the circuit, the judge might take them around in a cart through all the remaining counties in that circuit, and could receive their verdict in any county; but he must of course discharge them, when arriving at the last border of the last county in his circuit; for his authority as a judge of Nisi Prius was then at an end. As the court has no power to discharge the jury, and as the functions of the court cease at the end of the circuit, the jury are kept in attendance the entire time, unless they agree, and when the judge departs from the bounds of the last county, the duty of the jury necessarily terminates with the existence of the court to which it is attached, and of which it is a part. It will be found, therefore, when the presiding judge in different cases speaks of carrying a jury to the bounds of the county, and then discharging them, that he is at that time

in the last county on that circuit. See also 3 Bl. Com. ch. 23.

We have thus stated at some length the principal cases and arguments against discharging a jury because they say they cannot agree, and it remains to consider the other side of this interesting question. And the earliest reported case on this side within our knowledge is *The People v. Denton*, 2 Johnson's Cas. 275, in 1801, before the Supreme Court of New York. It was a misdemeanor, and the jury, after being sent out several times, returned to the bar, and could not agree upon a verdict. They were discharged by the court without the defendant's consent, for the untenable reason as given *per curiam*, that "the power of discharging a jury, in cases of misdemeanors, as in civil cases, rests in sound discretion, and is to be exercised with caution. Where every reasonable endeavor has been used to obtain a verdict, and it is found that the jury cannot, or will not agree, they must, *ex necessitate*, be discharged." The same question was again raised a few months after before the same court, with a view that the court should reconsider its former decision. *The People v. Olcott*, 2 Johnson's Cas. 201, (1801). This led the court to give the subject a further and more attentive consideration, and to come to the conclusion that in misdemeanors there was no rule of the common law denying the power of the court to discharge the jury whenever they deem it requisite to a just and impartial trial. And as this is the leading case in America on this side of the question, we quote from Judge Kent's opinion: "I conclude, then, that as no general rule or decision that I have met with, exists to the contrary, in a case of misdemeanor; and as the rule, even in capital cases, abounds with exceptions, and is even questioned, if not denied, by the most respectable authority, that of nine of the judges in England, it must, from the reason and necessity of the thing, belong to the court, on trials for misdemeanors, to discharge the jury whenever the circumstances of the case render such interference essential to the furtherance of justice. It is not for me here to say, whether the same power

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exists in the same degree, (for to a certain degree it must inevitably exist,) on trials of capital crimes, because such a case is not the one before the court; and I choose to confine my opinion strictly to the facts before me.

"With respect to misdemeanors, we may, with perfect safety and propriety, adopt the language of Sir M. Foster, which he, however, applies even to capital crimes; 'that it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases that may come under the general question touching the power of the court to discharge juries sworn and charged in, criminal cases.' If the court are satisfied that the jury have made long and unavailing efforts to agree; that they are so far exhausted as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference. All the authorities admit, that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same. So it is admitted to be proper to discharge the jury when there is good reason to conclude the witnesses are kept away, or the jury tampered with, by means of the parties. Every question of this kind must rest with the court, under all the particular or peculiar circumstances of the case. There is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn and charged, no other jury can, in any event, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court, to judge of that necessity, and to determine what combination of circumstances will create one.

"There is an opinion given, in an ancient book, of approved authority, (The Doctor and Student, dial. 2, ch. 52,) which comes up fully to the case before the court. In answer to the fifth question of the doctor, whether it stand with conscience to pro-

hibit a jury meat and drink till they be agreed, the learned author (St. Germain) puts this answer into the mouth of the student, 'that if the case happen that the jury can in nowise agree in their verdict, and that appears to the justices, by examination, the justices may, in that case, suffer them to have both meat and drink for a time, to see whether they will agree; and if they will in nowise agree, I think (continues the student) that the justices may take such order in the matter as may seem to them, by their discretion, to stand with reason and conscience, by the awarding of a new inquest, and by setting a fine upon them, that they shall find in default, or otherwise, as they shall think best, by their discretion; like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf.'

"This power in the court, so far from impairing the goodness or safety of trial by jury, must add to its permanence and value. The doctrine of compelling a jury to unanimity, by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, that does not, as St. Germain evidently hints, stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day. So a verdict, obtained unfairly, by secret and artful, or bold and direct influence over the jury, by the parties, their friends, or bystanders, would, if admitted to be recorded, be a disgrace to the administration of justice. The power of discharging a jury, in these and other instances which might be enumerated, is a very salutary power, and calculated to preserve that mode of trial in its purity and vigor."

Several years afterwards the same question arose before the same court in a case of *felonv*, and following and approving

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Olcott's case, the court held that there was no distinction in this respect between felonies and misdemeanors, and that the reasoning of *Olcott's case* embraced "every possible case of a trial for crimes." *The People v. Goodwin*, 18 Johnson, 187.

The Supreme Court of Massachusetts, at an early day, in a capital case, ordered a juror to be withdrawn, after the jury had been confined part of a day and a whole night, and had not agreed upon a verdict, and it was not probable that they ever could agree; and on another trial the prisoner was convicted. This practice was held proper, and a motion in arrest of judgment was overruled. *Commonwealth v. Bowden*, 9 Massachusetts, 494, (1813). From the report of the opinion, which was a *per curiam* opinion, the subject would seem to have passed without much deliberation, and the reasoning in support of the opinion is much more concise than usual upon new questions of importance. The question, however, received deliberate examination in the subsequent case of *Commonwealth v. Purchase*, 2 Pickering, 521, (1824). That was an indictment for murder, and the jury having been out eighteen hours, without agreeing upon a verdict, and it appearing to the court that further deliberation would have no tendency to make them agree, they were discharged. The prisoner being convicted by a second jury on the same indictment, moved in arrest of judgment, on the ground that his life had been twice put in jeopardy for the same offence. The motion was overruled. And Parker, C. J., after examining the established cases where the discharge had been granted, said: "Assuming it then as an incontrovertible principle, that a jury charged with a cause on an indictment for a felony may be discharged of it without a verdict in cases of necessity, it remains to be inquired, whether the case before us is one of that description. By necessity cannot be intended that which is physical only; the cases cited are not of that sort, for there is no application of force upon the court or the jury which produced the result. It is a moral necessity, arising from the impossibility of proceeding with the cause without producing evils

which ought not to be sustained. According to the practice of England in ancient, if not in modern times, it may be doubtful, whether the mere disagreement of a jury would constitute the necessity in question; for by that law the jury, after the cause is committed to them, are to be kept without meat or drink, fire or candle, until they shall have agreed; and if this shall not be until the term of the court is closed, they may be made to follow the judge in carts to the next shire, and so until they shall have agreed. Under this severe coercion it will be rare that a jury withholds a verdict beyond a reasonable time, though it may well be doubted whether a verdict so obtained would do any honor to the administration of justice. It is well known that this manner of dealing with juries has not been practised in this commonwealth, of late years, if it ever was. In all cases committed to them they are made as comfortable as circumstances will admit; are accommodated with fire and light, and are allowed reasonable refreshments at proper intervals. This change is owing to a general change of circumstances, and among others, to the more proper estimation of the agency of the jury in criminal trials than was formerly had. Practically, as well as theoretically, there is now a trial by jury; the members of it are deemed to be sound and intelligent men; it is supposed that their minds and faculties are to be exercised on the subjects committed to them. And that their verdict is the truth, as found by the evidence submitted to them. In this state of things, to attempt to coerce them by restraints and privations would be absurd. The jury themselves would revolt at any attempts to overpower their minds by famine or other violence, and resolute adherence to opinions already formed would be the sure consequence of any unreasonable effort to coerce them into a formal agreement. This change in the manners of the times, of necessity produces a change in the course of trials. If a jury cannot now be starved into a verdict, if they cannot be carried in the train of the judge from county to county, it seems necessarily to follow, that when they

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have applied their minds to the case as long as attention can be useful, and have come to a settled opinion resulting in a disagreement, the cause must be taken from them; and public justice demands that another trial should be had. But it is said, this is putting a man's life twice in jeopardy for one and the same offence. So it is when any of the accidents happen which are acknowledged to form exceptions to the rule. So also, when a man is acquitted on an indictment substantially bad, or convicted, but the judgment is arrested; although in these cases ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment. This protection, however, is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case.

Another objection is, that the discretion thus claimed for the court to discharge a jury in case of final disagreement, is dangerous, and may be exercised to the prejudice of prisoners, especially if the government, or the public, or the court itself, should for any cause desire their conviction. And it is true, that discretionary power in a judge is not unattended with danger; but still it must be given, and the course of justice cannot be pursued without it. If not exercised in this way, it may be in many others, to the same end; for instance, by granting a continuance on the suggestion of the public prosecutor, upon plausible pretexts, when the real ground may be to postpone the trial to a season more favorable to a conviction." See also *Commonwealth v. Roby*, 12 Pickering, 503, Shaw, C. J.; *The State v. Updike*, 4 Harrington, 581; *Hurley v. The State*, 6 Ohio, 399. These cases, together with that of *United States v. Perez*, 9 Wheaton, 579, ante, 356, go far to establish the doctrine that it is entirely discretionary with the court before whom the case is on trial, whether or not a case of necessity has occurred, to justify the discharge of the jury, and that being a matter of discretion, it cannot be reviewed by a higher tribunal. Indeed this was the express

decision of the court of New York, in *The People v. Green*, 13 Wendell, 55, (1834,) where the jury were discharged after only an *half hour's deliberation*. The court above decided they had no power to review the decision, as it was purely *discretionary*! But many authorities hold that the cause for the discharge of the jury should be set forth on the record, in order that its sufficiency may be passed upon by a higher tribunal. Thus in *Conway v. The Queen*, 7 Irish Law R. 164, Perrin, J., said: "I do not acknowledge the existence of any discretionary power in a judge to act upon his own opinion without grounds shown, which may be considered by a superior court. I know of no authority for such position." And Pennefather, C. J., added: "I cannot agree with the proposition that under all or any circumstances, such a discretionary power is vested in the judge, and that he has, without being responsible, a power of discharging a jury, as has been done in this case. There are wide distinctions between civil cases and a case of this description." And in *Newton's case*, 13 Queen's Bench, 734, Coleridge, J., said: "I agree with the judges in the case of *Conway v. The Queen*, in thinking it most desirable that the discretion of the judge should be subject to review. All discretionary power is liable to abuse. See also *The State v. McKee*, 1 Bailey, 654; *The State v. Waterhouse*, Martin & Yerger, 279; *The State v. Ephraim*, 2 Devereux & Battle, 166; *Poage v. The State*, 3 Ohio St. R. 239. In *Wright v. The State*, 5 Indiana, 292, Hovey, J., said: "We are aware that the courts of New York have gone to the other extreme in 13 Wendell, 55, but with deference to that court we cannot coincide with the learned judge who delivered the opinion. We think it would be trusting unguarded power where it might be seriously abused, and that, more especially from the fact that they deny the correction of that abuse by resort to the higher courts." An examination of the reported cases shows that as a matter of fact the cause of the discharge of the jury is gen-

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erally spread upon the record, and perhaps the true rule is, the superior court cannot revise the decision of the lower tribunal as to the *existence* of the occasion for the discharges, but may examine its *sufficiency* in point of law. E. H. B.

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Easter Term, 1819.

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The dispersion of the jury with the permission of the judge during the interval of an adjournment in case of a misdemeanor, does not vitiate their verdict, where there is no suggestion of their having been improperly practised upon in the interim. Whether the jury shall or shall not be permitted to separate before verdict, in cases of misdemeanor, is matter of discretion with the judge.²

THESE defendants, sixteen in number, were indicted for a conspiracy to obtain goods by undue means; and the indictment charged

¹ 1 Chitty, 401; 2 Barnewall & Alderson, 462.

² *Note by the Reporter.* Vide the Year Book, Trin. T., 14 Hen. 7, fol. 29. In the Exchequer Chamber, before all the judges of the one bench and the other, it was rehearsed that at Nisi Prius, in the county of B., upon an issue between the Bishop of N. and the Earl of Kent, the jurors were chosen, tried, and sworn; and whilst the parties were giving their evidence, there came such a storm of thunder and rain that some of the jury departed without leave of the justices, (it seems they stood open in the street, Bro. Abr. Verdict, pl. 19); and one of the jurymen went into a house, where he met with persons who told him to take care what he did, for the matter was better for the Earl of Kent than for the bishop; and prayed him to drink with them; and so he did; and after the storm was over, the jurors returned, and no challenge was taken to them. They were sent into an inn, and when they were agreed as to the verdict they were to deliver, the Earl of Kent showed all this matter to the justices; and the jury, on being questioned by the justices, confessed it all. Being then asked if they were agreed in their verdict, they said, Yes, and found for the bishop; and the justices were in doubt if the verdict was good or not, and consequently they adjourned. Wood, Justice, now rehearsed all this matter, and it seemed to him that the verdict should be taken; and although the jurors had no leave to depart, but did it of their own heads, that is only a ground why they should be punished by fine, as appears best to the justices. Vavisor, J., (in Bro. Abr. tit. Verdict, pl. 19, Banister, J.) contra. When a jury is charged, they are, as it were, prisoners until they are discharged, and cannot depart without the license of the justices; and if they had been put in a house and under guard, and had departed without license, and then three or four days afterwards they had returned and given their verdict, that would have been void; then here they departed without license, and although no evidence was given, that is not material in my view of the case. Rade, J., was of opinion that the verdict was good; he agreed that the jurors are charged that they cannot depart without license; but yet there may be some cases where their departure shall be excused, even without license. As if an

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“that they did unlawfully and wickedly conspire, combine, confederate, and agree together, that John Meyer and Henry Weiller

affray happens suddenly before the justices, and they depart to preserve the peace, their departure is lawful; and so, if they are in a house, and the house fall, they may depart to save their lives. And here, in my opinion, they had a good cause for departing, that is to say, the tempest; therefore their departure is good and excusable. Davers, J., of the same opinion. The departure is no ground to make the verdict void; for this misdemeanor of the jurors the justices cannot annul their verdict; they may adjudge a fine upon them, or imprison them, or impose any other punishment of the like nature according to their discretion; but this is no cause to avoid the verdict. Tremaille, J., of the same opinion. First, they had a reasonable ground of departing on account of the tempest, and for reasonable cause, as has been said, they may depart well enough. Hody, Chief Baron, and Brian, were of opinion that the verdict was void; the latter said, it is reasonable that they should be allowed to depart when they have cause, as in the case of a house falling, etc., but the rain was a feeble cause for the departure; wherefore their going, and all their misdemeanor was without cause; wherefore it seems to me that they shall be fined, and also their verdict shall be void. Fineux, J., was of opinion, that the departure was no ground for avoiding the verdict. The case was adjourned, and came on again in Hil. T. 15 Hen. 7, fol. 1; when Keble said, It seems to me that they may well depart for a reasonable cause, notwithstanding the prohibition, and no punishment shall follow. It is commanded by the statute that none shall commit waste, and yet the sudden coming of the tempest shall be an excuse for the happening of waste. The same law is of breaking prison, but if the prison be on fire, a departure is no breach of the law. This case is cited in Bro. Abr. Verdict, pl. 19; where it is said, that the better opinion is, that the verdict in this case was good, notwithstanding the departure. In Bro. Abr. tit. Jurors, pl. 13, it is said, that the jurors may separate by reason of a great tempest or affray, or the falling of a house, and the same law is of a fire in the house. See also Kelyng's Rep. 2d ed. 56. The Lord *Dacre's case*, who was indicted for treason before commissioners of oyer and terminer in the county of Cumberland, for adhering to the Scots, the king's enemies, and tried by his peers, 26th Hen. 8, the Duke of Norfolk being high steward; and the day before the trial all the judges assembled to resolve certain questions which might arise upon the said trial, so that if any question should be asked them, they might resolve *una voce*. And a question was moved among them, that if the peers did not agree, so that the court was adjourned till the next day, what should be done with the peers, who were the tryers? And some judges held they were to be kept together all night, but others held because they were not sworn, for the great trust reposed in them and presumed to be in them, they might go to their own houses every one by himself. In 2 Lilly's Prac. Reg. tit. Jury and Juror, p. 123, a case is cited of East. T., 24 Car. K. B. where it is laid down that after a juror is sworn he may not go from the bar until the evidence is given, and the directions of the court, for any cause whatsoever, without leave of the court, and though he has leave he must have a keeper with him. But it is not stated, that if they disperse with leave, the subsequent verdict shall be void. In the case of *The King v. Stone*, A. D. 1796, 6 T. R. 530, 531, which however was an indictment for high treason, the court having sat on the first day of the trial from nine o'clock in the morning till ten o'clock at night without any interruption or refreshment, and the attorney-general stating that his evidence would occupy four hours more, and some of the jury being very much exhausted, and incapable, as they declared, of keeping up their attention much longer, the court adjourned till nine o'clock the next morning, Lord Kenyon observing that necessity justified what it com-

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respectively, and also Joseph Leigh, and one Thomas Reeve, (who were persons in poor, low, and indigent circumstances,) should falsely

pelled; and that though it was left to modern times to bring forward cases of extraordinary length, yet no rule could compel the court to continue their sitting longer than their natural powers would enable them to do the business of it. The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them touching any matter relative to this trial." The entry of the adjournment was in the following form: Thursday next, after, &c. Forasmuch as it appears to the court here, from the length of time which has been already occupied by the trial of the issue joined upon this indictment, and the further time which will be necessarily occupied by the same, that justice cannot be done if this court proceed without intermission upon the said trial. It is ordered, that the jury impanelled and sworn to try the said issue have leave to withdraw from the bar of this court, being well and truly kept by six bailiffs, duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue, and that the same jury shall again come to the bar of this court on the morrow at nine o'clock in the forenoon. And it is further ordered, that the prisoner be again brought, &c.

After the evidence has been heard, and the jury retire to consider of their verdict, the oath administered to the bailiff who is sworn to keep them is as follows: You shall swear that you shall keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, (not adding the words, touching any matter relative to this trial, as in 6 T. R. 530, 531, et supra,) but only to ask them whether they are agreed. So help you God. Dalt. ch. 185; 2 Hale, 296; Dick. Sess. 223; Bac. Ab. Juries, G.; 1 Chitty, C. L. 632. Accordingly, in Com. Dig. tit. Enquest, F., it is laid down, that after the evidence given the jury ought to continue together till they agree of their verdict, without eating, drinking, fire or candle, or speaking with any one, except the bailiff, to know if they be agreed. Co. Litt. 227 b; 3 Inst. 29, pl. 13, 15 Hen. 7; 1, 2. If a great tempest happens, the jury may depart from the place where they are to consider of their verdict. So if a sudden affray happens, or if the house be upon the point of falling, Vin. Abr. tit. Trial, G g 4, cites Bro. Verdict, pl. 19, 14 Hen. 7, 29. Per Rede, Davers, and Tremaine, Bro. Jurors, pl. 13, S. C. The same law seems to be of fire upon the house, id. ibid. Vin. Abr. tit. Trial. (G g 4.) So in Com. Dig. tit. Enquest, F., if the jury separate on account of a great tempest they shall not be amerced. Plowd. 13 b, 15 Hen. 7; 1 b, 14 Hen. 7; 30. In 4 Bla. Com. 360, it is said, that when the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity, Co. Litt. 227, 3 Inst. 110, Fort. 27; *Gould's case*, Hil. 1764) till they have given in their verdict, but are to consider of it, and deliver it in with the same forms as upon civil causes, only they cannot in a criminal case which touches life or member give a privy verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. In *Parke's case*, 2 Roll. Rep. 85, at Nisi Prius, a juror was challenged and withdrawn, and afterwards went out with the jury and stayed with them above half an hour. And by Croke and Doddridge, this act shall not set aside the verdict, unless it can be proved that they had new evidence given after they went out of court, but it is a misdemeanor in him who was challenged, and punishable, 2 Hale, P. C. 308, 309. Vin. Abr. Trial, G g 4. See also *Lord St. John v. Abbot*, Barnes, 441. This cause was tried at the Northampton Summer Assizes, 8 Geo. 2, before Mr. Justice

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assume and take upon themselves the characters of persons of good credit and reputation, in opulent circumstances, and possessed of large property, and engaged in very extensive dealings as merchants, keeping large sums of money at their respective bankers, and paying ready money for divers large quantities of goods, wares, and merchandises, and thereby, and by divers other false, artful, and subtle contrivances and stratagems, to cause the said John Meyer and Henry Weiller respectively, and the said Joseph Leigh and Thomas Reeve, to be represented and taken for respectable and opulent merchants of great credit, reputation, and punctuality in their dealings, and persons who might safely be supplied and trusted with large quantities of goods, chattels, wares, and merchandise, on credit, and to induce divers of the liege subjects of our said lord the king to believe that the said John Meyer and Henry Weiller respectively, and the said Joseph Leigh and Thomas Reeve, were respectable and opulent merchants, of great credit, reputation, and punctuality in their dealings, and persons who might safely be supplied and trusted as aforesaid, and that they the said John Meyer, Henry Weiller, and Joseph Leigh and Thomas Reeve, should obtain and get into their hands divers goods, chattels, wares, and merchandise to a large

Reeve, and as the evidence was summed up in the forenoon, the jury retired to consider of their verdict; before the rising of the court they came into court attended by the bailiff, to ask a question, which was answered, and they were sent back. At the sitting of the court in the afternoon, the judge was informed that some of the jury-men (two or three) were in court; whereupon being asked by him what they did there, answered they could not agree, and were thereupon sent back to their fellows, and afterwards a verdict was brought in for the plaintiff. The judge did not certify the verdict to be contrary to evidence, and the court were of opinion that this was a misbehavior in the jury for which they were finable, but not a sufficient cause to set aside the verdict, and the plaintiff was not in fault. If the jury had eat and drank at their own expense, that is a misbehavior for which they are finable, but their verdict must stand; though it is otherwise if they had eat and drank at the expense of either party. Rule discharged. See also 1 Vent. 124; 2 Rol. Ab. 715; Hawk. B. 2, ch. 47. In Bul. Ni. Pri. 308, it is said, an officer of the court ought always to be placed at the door of the box where the jury sit, to prevent any one from having communication with them, and when they depart from the bar they are to be attended by a bailiff sworn for that purpose. At the present day it appears that the jury will not be permitted to disperse after they have retired for the purpose of considering their verdict; although in a case of misdemeanor a dispersion of the jury, with the judge's concurrence, on an adjournment taking place during the progress of a trial, will not be sufficient to avoid the verdict. Convenience seems to be in favor of this practice. It is always in the power of the judge to prevent the jury from dispersing, where the trial is of such a nature as to render it expedient that the jury should be kept together. Some consideration also seems due to the jury, who are in general men of active lives and regular habits, and are therefore likely to sustain great inconvenience by being totally prevented, during the continuance of a very long protracted trial, from any attention to their affairs, however urgent.

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amount, to wit, to the amount of fifty thousand pounds and upwards, of and from divers of the liege subjects of our said lord the king, under color and pretence of purchasing the same, and that they the said defendants should cheat and defraud the said subjects of the said goods, chattels, wares, and merchandise." The indictment then went on to charge them with other acts in pursuance of the said conspiracy, and there were sixteen other counts, varying the mode of charging the several defendants with being concerned in the said conspiracy. With respect to two of the defendants, the counsel for the crown offered no evidence, and they were acquitted and afterwards examined for the prosecution; and other of the defendants had absconded and could not be found. At the trial before Abbott, C. J., at the adjourned sittings at Guildhall on the 20th instant, the defendants Mozely Woolf, Lewis Levy, and John Kinnear, were found guilty.

Scarlett (with whom were *Pollock* and *Wilde*) for the defendant Woolf; *Knowlys* for the defendant Levy; and *Denman* for the defendant Kinnear, now severally moved, on their behalf, for a rule to show cause why the verdict of guilty should not be set aside and a new trial granted, on the ground that the finding of the jury was invalid, the jury having dispersed and separated during the interval of an adjournment, before they delivered their verdict. The affidavits in support of this motion, which were made by the defendants themselves and their attorneys respectively, stated in substance, that the trial had lasted two days; that on the morning of the 20th instant the trial commenced at Guildhall, and about eleven o'clock at night, the case being then unfinished, the court adjourned until the following morning, and that the jury separated and retired to their respective homes;¹ that the next morning they assembled again, and the case being concluded at a late hour in the afternoon of that day, they found the said defendants guilty; and that the said defendants and their respective attorneys were wholly ignorant of the fact of the jury having separated and retired to their respective residences, until after they had found their verdict.

Scarlett, in support of the motion for the defendant Woolf, contended that the two facts sworn to in the affidavits — 1st, that the jury had separated before they pronounced their verdict; and 2nd, that the defendants were wholly ignorant of the circumstance until

¹ The jurors were particularly addressed by Abbott, C. J., who informed them, that they might retire to their families, but especially warned them not to have any communication with any person touching or concerning the matter in issue.

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after the verdict was delivered, were sufficient to sustain this application. He cited *Rogers v. Smith*, Palmer's Rep. 380, Trin. 21 Jac. 1, K. B.; *Lord Delamere's case*, 4 Harg. St. Tr. 232, 1 Jac. 2, A. D. 1685, and Kelyng, 56; the *case of Elizabeth Canning*, tried at the Old Bailey, 29th April, A. D. 1754, 10 Har. St. Tr. 206; 10 St. Tr. 406, 407, 408, note; *Stone's case*, 6 T. R. 530, and the recent trials for high treason. *The King v. Watson*, Trin. T. 57 Geo. 3.

[BEST, J., said he believed there were a great number of instances in which the jury in cases of indictments and informations for misdemeanors, had been permitted to separate before they delivered their verdict.¹ He remembered himself one case in Surrey, of an indictment for an assault on a custom-house officer, when he was at the bar, in which an adjournment took place, and the jury were suffered to disperse, but with a caution from the learned judge to take care that they had no conversation with any person during the interval. He had no doubt that there had been a great many cases under the like circumstances.]

Knowlys, for the defendant Lewis Levy, cited several cases from Giles Duncomb's "Trials per pais, or the Law of England concerning juries by Nisi Prius,"² 2 Hale, P. C. 296 and 297; 1 Inst. 227 b; Pal. 380; *Melcalfe v. Deane*, Cro. Eliz. 189; Roll. tit. Trial, 714, pl. 6; Com. Dig. Pleader, § 45; 11 H. 4, 17 Roll. tit. Tr. 714, pl. 8.

Denman, for the defendant Kinnear, referred to 2 Rol. Abr. 714, l. 25; Com. Dig. Pleader, S. 45; *Doctor Watson's trial*, A. D. 1817, 2 Stark. 116; *Trials of Hardy, Tooke, &c.*, A. D. 1794, V. 6 T. R. 530, note a; Bac. Abr. Verdict; *Rex v. Stone*, 6 T. R. 530, 531.

The judges, after deliberating a few minutes, delivered their opinions seriatim.

ABBOTT, C. J. If we entertained any doubt upon a question of this kind, which is of importance by reason that the subject-matter of it relates to the trial by jury, we should pronounce a very deliberate opinion; but as none of us do entertain any doubt, it is unnecessary to take any further time for consideration. I am of opinion that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts: 1st, That the jury had dispersed during the night; and 2dly, That that fact was not known to the defendants until after the trial was

¹ See the distinction taken between felonies and misdemeanors, Hawk. B. 2, ch. 47, § 1.

² P. 249-252, 253. This book said to be of no great authority, Willes, 667.

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over. Now, the trial began between nine and ten in the morning, it had proceeded until eleven o'clock at night, or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed separately for several defendants. It must be assumed (and nobody could assume to himself the contrary) that in that stage of the case evidence would be laid before the jury on the part of the defendants. It became matter therefore of necessity that the trial should be adjourned, and an adjournment accordingly took place from the necessity of the case, the jury being fatigued both in mind and body; and it would have been most injurious to the case of the defendants, even if the judge and jury had had strength enough to go on till the trial came to a close; I say, most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for in many cases, (and in many cases they ought) they are kept together till the final close of the trial. But I am of opinion, that in case of a misdemeanor, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact, that there are many instances of late years, in which juries upon trials for misdemeanors have dispersed and gone to their abodes during the night for which the adjournment took place; and I consider every instance in which that has been done, to be proof that it may be lawfully done. It is said, that in some of those instances the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference. I think the consent of the defendant in such case ought not to be asked;¹ and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him, which every person standing in the situation of a defendant would wish to avoid. I am also of opinion, that the consent of the judge would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall at all events be kept together until the close of the trial for a misdemeanor, it does not appear to me that the judge would have any

¹ In 6 T. R. 530, note *a*, it is mentioned, that on the trial of Hardy the adjournment was stated to be made by the consent of the prisoner; but on the second trial (that of Horne Tooke) the judges who sat having in the mean time conferred with the rest of their brethren, said, they were clearly of opinion it might and ought to be done by the authority of the court, without calling on the prisoner for any consent.

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power to dispense with it. The only difference that can exist between the fact of the jury separating with or without the approbation of the judge, as it seems to me, is this, that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict in a case of this kind, as it would if the law required the jury to be absolutely kept together. Now it is not surmised in this case, that during the night (for it was during night only that the separation took place) any attempt was made to practise upon the jury. If any thing like that could have been shown, the court would require that matter to be investigated. But it is not even suggested that any such thing took place. All that is suggested is, that in point of fact the jury were allowed to go to their own homes in order to take there the necessary refreshments, which they might have had at some other place with much less convenience to themselves. (Vide Com. Dig. Pleader, S. 11.) That is all that is suggested. I have already intimated, that the separation of the jury without the previous concurrence of the judge, might be a misdemeanor in them. It seems to me that the law has vested in the judge the discretion of saying whether or not, in any particular case, it may be allowed to the jury to go to their own homes during a necessary adjournment, throughout the night. There are many cases in which the law vests a discretion in the judge. Those who fill that office (I am sure I may say so of myself) consider themselves bound down by the rules of law, and the less they are armed with discretion, the more satisfactory to themselves are the duties they have to perform. It has been said in this particular case, that what took place at the close of the trial furnishes an additional argument to show that the jury ought not to have been allowed to separate. I was greatly concerned at what did take place. The verdict of the jury, in whatever case it may be given, ought to be received with reverential silence, whatever may be the sentiments of those who are auditors, whether they approve of or dissent from the opinion which the jury have delivered. I must own, I think such conduct as that I have mentioned on the part of those who are present in a court of justice, is at all times very reprehensible, because juries may possibly be influenced by the manner in which they may imagine their verdict would be received, instead of attending to the evidence, and acting according to the result of their own honest judgment. They are to attend to the evidence, and give their verdict according to their own dispassionate view of the case submitted to them, without considering what opin-

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ion may be produced in the mind of the world at large, because none but themselves can judge of the propriety of what they do. For these reasons it appears to me that there is no ground for the present application, and I conceive we ought not to give any reason to suppose that any doubt exists, when none really exists in our minds.

BAYLEY, J. It is no part of this application that the verdict was contrary to the evidence, and that upon a new trial there could be any fair ground for expecting a different result from the evidence upon which this conviction has taken place. It is put upon the plain, simple, dry ground, whether, because the jury separated and the defendant gave no consent to that separation, and did not know until after the verdict was given that that separation had taken place, he is, as a matter of right, entitled to call upon the court to vacate the verdict and grant a new trial. Now upon that naked point it seems to me that he has no right to make such an application. In almost every trial it is in the experience of persons who attend courts of justice, the judge as well as the jury are occasionally absent for a short period. That is very often so, and perhaps it may be said improperly. But they go out only for a few minutes. If, then, a separation for a night will vacate a verdict, why may not a separation of two minutes vacate a verdict? It is said in that case the parties have the opportunity of seeing the separation, and making any objection. But in the case of a prisoner who does not know what the law is upon the subject, he may be tried and convicted on account of his ignorance of the law,—he may not know how the objection ought properly to be made, and it would be hard upon prisoners if their silence in that respect were to operate to their prejudice. On the contrary, it would be the duty of the judge to interpose in their behalf as counsel for them, and say that inasmuch as some of the jury in law, had separated, no verdict could be given, which would be good, and therefore direct the trial to be stopped.¹ Every object and purpose of justice is effectually answered, and every supposed inconvenience is effectually rebutted by the law as it stands; for as the law now stands, if the jury separate without consent, and improperly so, it is in the discretion of the judge who tries the cause to impose upon them such punishment and fine as he may think fit. If the jury disperse without consent they are guilty of a contempt, and the judge may punish that contempt by fine; but that is matter of discretion, and matter of discretion only. If the verdict, when it is ultimately pronounced, and when contrasted with the evidence, appears fairly

¹ See, as to the doctrine of the judge being to be considered in the light of counsel for the prisoner, 1 Chitty's Crim. Law, 407.

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to admit of doubt, and if persons could hesitate upon the question whether another jury would come to a different conclusion, we might take into consideration that the jury had separated. But when the fact of separation *per se* is urged as a ground for a new trial, it is of no weight. That is laid down as a general principle, and as that is the only ground upon which this application is made to vacate the verdict, I think it is not sufficient. If this be a valid objection, we do not do any injustice by discharging this application; for if the separation of the jury vacates the verdict, the parties have the opportunity of so doing by bringing a writ of error, assigning as matter of error that before the jury gave their verdict, they separated; and then if the law be, that every separation of a jury vacates their verdict, the defendants would be entitled to the benefit of that opinion upon such an application. I state that, not because I have the least doubt upon the question, but if it were a valid legal objection, that is the legal course to be taken. It appears to me that we do no injustice in this particular case by refusing this application. This objection *per se*, affords no foundation whatever for vacating the verdict, where, upon the whole of the evidence in the case, there does not appear any ground for a suggestion that a different verdict would be the result of a new trial.

HOLROYD, J. I am entirely of the same opinion — that a separation of the jury does not render the verdict invalid. I do not find any authority in law which says that the separation of the jury in a case between party and party, or in the case of a misdemeanor, does avoid the verdict. If the jury are guilty of any improper conduct in any separation, which ought not to take place without the authority of the court, they may be guilty of a misdemeanor, and may be fined and punished as such; but it appears to me that that would not avoid the verdict. In case any probable mischief is likely to result from a separation, without any care being taken to prevent it, either from the inattention of the judge, or upon any suggestion of that kind, you may direct such measures to be taken as shall prevent the effects of such separation, assuming under such circumstances any mischief is likely to arise. It appears to me, however, to be matter that will not avoid the verdict; but if it is, it will still be matter of error, and the defendant will not be prevented from obtaining judgment upon it by bringing a writ of error, supposing it to be in point of law a sufficient objection to invalidate the verdict. I agree with the rest of the court in this case, that there is not sufficient ground upon which we ought to grant a new trial. If it appeared that in the course of a separation the jury had received any improper suggestion, or had found their verdict upon evidence con-

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trary to that which was laid before them in court, that would be a sufficient ground to doubt the propriety of the verdict. This would be a ground upon which the court must and ought to proceed, if any doubt remained in consequence of their separation, or any thing that passed in the interval, or considering the verdict with reference to the evidence, whether the jury had come to a right and proper conclusion, or whether they had come to a mistaken determination in consequence of any thing they had heard out of doors. Nothing however of that kind is suggested in the present case, and therefore I think there is no sufficient ground made out for granting a new trial.

BEST, J. I am of the same opinion. It is insisted here that this is a mis-verdict, and that no legal verdict has been given. Now I am alarmed at the extent to which the proposition contended for may be carried if it is well founded, for, if this is a mis-trial in consequence of the separation of the jury, I cannot discover any distinction between a separation for a minute and a separation for a considerable period of time; for if the argument is right, it is right to this extent — that if by any accident a jurymen gets out of the box for a single minute, it is a mis-trial.● Let us see the extent of mischief to which this doctrine may be carried. Suppose in the case of a trial for capital felony some of the jury by accident get out of the box, and the prisoner in the result of the trial is acquitted, the consequence of this argument would be that it would be a mis-trial, and the man must be put on his trial again. That is a consequence that alarms me, and I do not feel that we ought to give any countenance to an objection which would go to such a mischievous extent. There is not enough in this case to satisfy my mind that we ought to grant a new trial upon this ground. Several cases have been cited, and it appears that the only one which touches this question is that of *Lord Delamere* in the 4th State Trials, where the judges appeared to have said, that the jury once charged cannot be discharged. That that might be law at one time I have no doubt, but the practice for a long period of time will show what the law is, and I believe there is no judge who has sat for any length of time in this hall that has not known and approved of discharges of juries. The constant and uniform practice which has existed for a considerable length of time, will show that what is stated in *Lord Delamere's case* is not now to govern our decision. With respect to the case in *Palmer's Reports*, the only effect of that is to show that refreshments are not to be given to a jury who are sent out to deliberate upon the verdict, for the oath which is administered to the bailiff who has the custody of them, is, that they shall not have any refreshment till after they have agreed upon the verdict. That case therefore has

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nothing to do with the present question. With respect to all the cases cited from the trials *per pais*, those were cases where improper practices had been adopted by one of the parties, which might influence the decision of the jury in his favor; and certainly it would be highly improper that any man should have a verdict by undue means. It is not suggested here that any such practices have taken place, and therefore it does not appear that any one of these cases apply. It may be very often extremely inconvenient and improper that the jury should be permitted to separate before they deliver their verdict; but in such cases the judge is vested with a discretion upon the subject, which he will exercise on his own motion in keeping the jury together, or if either of the parties desired it, no judge would refuse such an application. If it were stated by either of the parties that there is cause to apprehend that some improper practices might take place if the jury were separated — that by mixing with the multitude they might imbibe their feelings, or that they might be influenced in their verdict by any communication with the crowd, there is no judge who would not prevent that from taking place by keeping the jury apart from the multitude till they gave their verdict. But if any such application were made by either of the parties, I do not see how it could be complied with in such a case as this, unless the party applying undertakes to defray the expense attendant upon keeping them together; for in the case of a misdemeanor I do not understand where the expense is to come from, for I do not agree in the propriety of keeping the jury shut up for a number of days at their own expense. It appears to me, however, that no mischief can result from allowing juries to separate, a discretion being always vested in the judge as to the propriety or impropriety of keeping them together, in each particular case. It has been stated that the public mind has been greatly agitated upon the subject of this particular case, by publications circulated in the world antecedent to the trial, and that consequently such publications must have operated to the prejudice of the defendants. I wish that that subject might fairly be brought under the consideration of the court, for there is nothing more mischievous to the administration of justice than the discussion in print of cases which are to be submitted to a court and jury. The learned counsel have stated unanswerable reasons why that practice should be put a stop to, but that does not furnish any argument why a new trial should be granted.

Rule refused.

Clearly connected with the discharge of a jury by the court, discussed in the note to *Kinlock's case*, ante, is their temporary

separation or dispersion, without the order of the court. Our principal case settles the law in England, that in cases of *misdemeanor*

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meanors, mere separation, without the least suspicion of any improper conduct, will not, *per se*, vitiate their verdict.

It has been supposed that a more strict rule applied in case of felonies, and some courts have deliberately held that if a jury in a capital case separate, even with the defendant's consent, a verdict of guilty is nevertheless void. *Pieffer v. The Commonwealth*, 3 Harris, 469, (1850); *Wesley v. The State*, 11 Humphreys, 502, (1851); *Wiley v. The State*, 1 Swan, 256, (1852.) And this extraordinary doctrine was in those cases declared to be derived from the language of Abbott, C. J., in the principal case, "That the defendant in such case ought not to be asked to consent to their separation." But whether a defendant on trial ought or ought not to be asked in presence of the jury, whether he will consent to their separation, is one thing, to be determined by the judgment and discretion of the presiding judge; but whether, if he does so consent, without being asked, his consent is of no effect, is quite another question. Why may not any person waive that which is intended only for his own benefit? *Consensus tollit errorem* is a just as well as a useful and convenient maxim. Indeed, it is not easy to see why, if a prisoner can plead guilty, he may not also consent to the separation of a jury. See also *The State v. Mix*, 15 Missouri, 153, (1851.)

But notwithstanding a few cases in America seem to hold that the bare separation of the jury during a capital case is sufficient cause to set aside a verdict; *The Commonwealth v. McCaul*, 1 Virginia Cases, 271, (1812); *Overbee v. The Commonwealth*, 1 Robinson, 756, (1842); *McLean v. The State*, 8 Missouri, 153, (1843); yet the current of authorities clearly is in favor of the doctrine, that the simple fact of separation, without any suspicion that the jury have been improperly approached or influenced, will not, of itself, be deemed sufficient to avoid their verdict. And no sound distinction exists in this respect between felonies and misdemeanors. 1 Devereux & Battle, 511, Ruffin, C. J.; 4 Cowen, 26, Woodworth, C. J. It has sometimes also been attempted to

establish a distinction between separation of the jury during the trial, and after the cause has been committed to them; but there seems to be no reason for such distinction, for the danger to be feared from their separation is the same in both cases; they may be improperly influenced as much before as after their instructions from the judge, and they have retired to deliberate upon the case.

In support of the general proposition above enunciated, the case of *The People v. Douglass*, 4 Cowen, 26, (1825), well deserves to be called the leading case. It was a case of murder, and during the trial the whole panel had leave to retire from the court-room under the care of two officers, and with instructions from the court to "keep together, and to return speedily." Two of the number left their fellows, conversed with bystanders about the trial, and drank whiskey. For the latter misbehavior the verdict was set aside, but the court were all of opinion that the separation alone would not be sufficient. Woodworth, J., said, "On looking into the books, we do not find that mere separation of the jury has ever been held a sufficient cause for setting aside a verdict, either in a civil or a criminal case, if we except, perhaps, the case of *The Commonwealth v. McCaul*, 1 Virginia Cases, 271." And the principal case was examined and fully approved.

So in *The State v. Miller*, 1 Devereux & Battle, 500, (1836,) a very elaborate and well-considered case on this subject. There, during a capital trial, after the evidence was closed on both sides, the court permitted the jury to leave the court-room, under the care of the sheriff; they returned in a "few minutes," when one was found to be absent; he came in, however, "in less than two minutes," and upon being inquired of the judge as to the cause of his absence, stated "that he was obliged to step aside to obey the calls of nature." The defendant offered to show that such juror, while absent, went to a store one hundred yards from the court-house, and there drank spirituous liquor. Ruffin, C. J., said: "I cannot think that an absence of a juror for two

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minutes from the body of the jury, without communication with any person, but to ask for a drink, does, *by itself*, annul the finding." Gaston, J., however, dissented in an able argument, thinking that it was incumbent upon the prosecution to explain the separation, and that the fact of non-communication with the absent juror should be affirmatively proved, or the verdict should be set aside; a doctrine, as we shall presently see, now very generally established. See also *The State v. Carstaphen*, 2 Haywood, 238, (1803); *The State v. Lytle*, 5 Iredell, 58, (1844); *The State v. Prescott*, 7 New Hampshire, 291, (1834); *Cannon v. The State*, 3 Texas, 31, (1848); *The State v. Babcock*, 1 Connecticut, 401, (1815); *Roberts v. The State*, 14 Georgia, 8, (1853); *Rowe v. The State*, 11 Humphreys, 491, (1851); *Riley v. The State*, 9 Id. 646, (1849); *McCarter v. The Commonwealth*, 11 Leigh, 633, (1841); *Thompson v. The Commonwealth*, 8 Grattan, 637, (1851); *Barlow v. The State*, 2 Blackford, 114, (1827); *Thomas v. The Commonwealth*, 2 Virginia Cases, 479, (1825); *Porter v. The State*, 2 Carter, 435 (1850); *The State v. Hester*, 2 Jones, 83, (1854); *Kennedy v. The Commonwealth*, 2 Virginia Cases, 510, (1826.)

But another principle must be taken in connection with the foregoing, quite as reasonable in itself, and quite as well established by the authorities, which is, that if the separation of the jury in a capital case was for such a length of time, or under such circumstances, and without leave of court or parties, that they *might* have been improperly approached, it is not the duty of the defendant to show that such event did happen, but the duty of the prosecutor to show clearly that it did not, or the verdict against the prisoner will be set aside. And this, because a prisoner, in such cases, is entitled as a matter of right, to require, in the first instance, a compliance with the ordinary forms provided by law to secure to him a fair and impartial trial; and if the guards provided for his security are neglected or disregarded, he is at least entitled to require, at the hands of the government, satisfactory evidence that he has not re-

ceived detriment by reason of such neglect, and is not to be put to show affirmatively, that such departure from the customary mode of trial has been the probable cause of his conviction. The shield which the law has provided would fall far short of affording him the protection intended, if it might be thrown aside at pleasure, and he have no right to complain, unless he could prove that the want of it had been prejudicial to his case; a matter which in many cases it might be very difficult to prove, notwithstanding such was the fact. The prisoner, therefore, has the right to call upon the officers of the government to show, in such cases, before they demand judgment, that the irregularity in the trial has not been the means of injustice in the verdict. And although it was held in *The State v. Camp*, 23 Vermont, 554, (1851), that this was not to be presumed, but that the burden of proving it was on the defendant, yet the rule above stated is well supported by the whole current of authority. See *The State v. Prescott*, 7 New Hampshire, 287, (1834); *Monroe v. The State*, 5 Georgia, 86, (1848); *McLain v. The State*, 10 Yerger, 241, (1837); *Stone v. The State*, 4 Humphreys, 27, (1843); *Hines v. The State*, 8 Humphreys, 597, (1848); *Cornelius v. The State*, 7 English, 784, (1852); *McCann v. The State*, 9 Smedes & Marshall, 465, (1848); *The State v. Tighman*, 11 Iredell, 514, (1850); *Organ v. The State*, 26 Mississippi, 78, (1853); *Stanton v. The State*, 8 English, 317, (1853). And notwithstanding the decision of *Organ v. The State*, 26 Mississippi, 78, (1853), directly contrary, it certainly is competent and proper to prove by the separating juror himself whether any thing improper took place while he was absent from his fellows. Such would seem to be the very best evidence of the fact; and the Supreme Court of Mississippi seem to have overlooked the well-settled distinction between allowing jurors to support but not to impeach their verdict. At all events the decision above cited is in conflict with the whole current of authorities.

In some States this matter of allowing the jury to separate, even during a cap-

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ital trial, either before or after the cause is committed to them, (in the latter case, however, sealing up their verdict,) is held to rest entirely in the discretion of the judge before whom the trial is pending, and not open to revision in a higher tribunal. See *Sargent v. The State*, 11 Ohio, 472, (1842); *The State v. Engles*, 13 Ohio, 490, (1844); *Davis v. The State*, 15 Ohio, 72, (1846); *The State v. Anderson*, 2 Bailey, 565, (1832); *The State v. McElmurray*, 3 Strobhart, 34 (1848); *The State v. Tilghman*, 11 Iredell, 514, (1850); *The State v. Lytle*, 5 Iredell, 58, (1844).

Doubtless the separation of a juror from the panel, without leave of the court, and unallowed by practice, would be, under certain circumstances, sufficient ground for animadversion by the court, and punishment. *The State v. Helverston*, R. M. Charlton, 48, (1820). But so would many other irregularities in the conduct of a jury which have never been supposed to furnish sufficient ground to vitiate their verdict. It may be irregular for jurors to indulge in intoxicating liquors during the

trial, but it is now well settled, that such indulgence will not, of itself, there being no excess, and no imputation of improper conduct, vitiate a verdict. *Rowe v. The State*, 11 Humphreys, 491, (1851); *Thompson's case*, 8 Grattan, 637, (1851).

Certainly, the impartiality, purity, and strict regularity of jury trials, especially in capital cases, are of the highest importance to the peace, welfare, harmony and security of the community. But it is not every irregularity which will render the verdict void, and warrant setting it aside. This depends upon another and additional consideration, viz., whether the irregularity is of such a nature as to affect the impartiality, purity, and regularity of the verdict itself. If the irregularity is of such a nature that it does not, and in its tendency cannot affect the rights of a prisoner, whatever other consequence may follow upon such irregularity, it will not avoid the verdict; because it has no tendency to affect that verdict injuriously to the party against whom it is found.

E. H. B.

 THE STATE v. JOSEPH CROTEAU.¹

December Term, 1849.

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At common law are the jury in every criminal case judges of the law as well as of the facts? Held by a majority of the court that they are; by BENNETT, J., that they are not.

INDICTMENT, in three counts, for violations of the license law of 1846. Trial by jury, March T., 1848,—BENNETT, J., presiding.

On trial the attorney for the government introduced testimony tending to prove three distinct sales of spirituous liquors by the respondent at different times, and then offered further testimony tend-

¹ 23 Vermont R. 14.

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ing to prove sales of spirituous liquors by him at other times. To this last testimony the respondent objected; but it was admitted by the court.

The counsel for the respondent, after having argued to the jury the questions of law as well as of fact, requested the court, among other things, to charge the jury, that, this being a criminal trial, all the questions of law and fact arising in the case were exclusively within the determination of the jury, and that they were the paramount judges both of the law and the facts.

The court did not so charge the jury; but, after stating to the jury the principles of law, which should govern the prosecution, in a manner that was satisfactory to the respondent, and to which there was no exception, proceeded to say to the jury, that it was their duty to receive the law from the court, and to conform their judgment and decision to the instructions which the court had given them, in applying the law to the facts of the case, as they should find them; that they alone were responsible for a correct finding of the facts; but that it was not within the legitimate province of the jury to revise the decision of the court in regard to the matters of law, which the court have given them in charge, and return a verdict in violation of and contrary to the instructions which they received; but it was their duty faithfully to conform to such instructions.

The jury returned a verdict of guilty upon each of the counts. Exceptions by respondent.

D. A. Smalley, for respondent. This being a criminal prosecution, the court erred in charging the jury that they were not judges of the law of the case, but must follow the direction of the court. This, we insist, is in direct opposition to one of the oldest and best settled principles of the common law. An examination will show, that the charge of the court contravenes all authority upon the subject, both English and American, (with two exceptions) from the Year Books to 1835.

It is admitted, that the judges are the constitutional advisers of the jury, and that the jury should pay great respect to their opinion; but the jury should never compromise their oaths by following the judges, when clearly convinced, that the charge of the court was wrong. Co. Litt. 228; 4 Bl. Com. 361; *Bushe's case*, decided 22 Charles II., cited by Kent, J., in *People v. Crosswell*, 3 Johns. Cas. 369; *Trial of the Seven Bishops*, 4 Harg. St. Tr. 395, (1688); *Rex v. Woodfall*, 5 Burr. 2661, (1770); 1 Chit. Cr. L. 520; *Henfield's case*, Wharton's St. Tr. 87, (1793). The Sedition Law, passed in 1798, declares, that the jury shall have a right to determine the law and the facts, as in other cases. Whart. St. Tr. 337;

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Frier's case, Ib. 587, (1797); *Calender's case*, Ib. 710, (1800); *Georgia v. Brailsford et al.*, 3 Dall. 4; 2 Wilson's Lectures, 372; *Commonwealth v. Knapp*, 10 Pick. 496; 13 Pick. 550; *Coffin v. Coffin*, 4 Mass. 25; *United States v. Wilson*, 1 Baldwin, 108; *State v. Snow*, 6 Shep. 346. The English courts, during the struggle of their government to put down the freedom of the press, took the side of the government, and determined that in prosecutions for a libel the jury could only decide as to the fact of the publication and the innuendoes, and the court would determine as to the intent, and whether libel, or not. But soon after the trial of the *Dean of St. Asaph*, 3 T. R. 429, n. parliament interfered and passed an act 32 Geo. III., declaratory of the right of the jury to pass upon the whole case, entitled an "Act to remove doubts relating to functions of jurors in cases of libel." This settled the question in England. The judges having disagreed in the case of *People v. Crosswell*, 3 Johns. Cas. 369, the legislature of New York, the same year, (1804,) passed an act making the jury judges of law and fact, as in other criminal cases. In this State the question was directly raised in *State v. Wilkinson*, 2 Vt. 480, and the opinion of the court fully expressed in favor of the rights of the jury.

The only cases that can be found in the English courts, where any of the judges favored the doctrine now claimed by the prosecutor, are *King v. Lilburne*, 1 Harg. St. Tr. 69, 81, 82, 1 Car. II., in 1649; and the trial of *Algernon Sidney*, 3 Harg. St. Tr. 805, before Judge Jeffreys. The former was before an extraordinary commission, eight years after the Star Chamber was abolished; but the jury returned a verdict of not guilty, and although examined before the council of state, nothing further was done with them, or with the case. The *dictum* of Ch. J. Best, in *Levi v. Milne*, 4 Bing. 195, [13 E. C. L. 396,] only applies to cases of libel. The first time the doctrine seems to have been favored by any American court was on the trial of *Balliste*, 2 Sumn. 243, in 1835,—where Judge Story charged the jury, that they must take the law of the case from the court; but he permitted the counsel to argue the law to the jury. The case of *The Commonwealth v. Porter*, 10 Met. 263, which is believed to be the only case, where the full bench have held this doctrine, presents the singular absurdity of deciding, that the defendant's counsel have a right to argue questions of law to the jury,—but the jury have no right to decide them. On the trial of Dorr for treason against the State of Rhode Island, Ch. J. Durfee told the jury, they must take the law from the court.

This doctrine expired in England, with Jeffreys, in 1688; it is of very recent origin here, beginning only fourteen years back, confined to two States, Massachusetts and Rhode Island, and in the last prob-

ably wholly political; and opposed to it is the long and well-settled practice of the English courts and bar, repeated decisions of the United States' courts from 1794, of the Supreme Court of the United States, the Supreme Courts of Massachusetts, New York, Maine and Vermont, the authority of eminent elementary writers, and the justice and propriety and security of the rule itself.

W. W. Peck, for respondent, insisted, that the prosecutor, having introduced evidence tending to prove three distinct sales of spirituous liquors, should not have been allowed to introduce evidence tending to prove other sales.

I. Richardson, for the prosecution. The county court acted in its discretion, in admitting the evidence objected to; and the jury were not misled thereby.

The court very properly told the jury, what the duties of the court were, and for what the jury were held responsible. *United States v. Battiste*, 2 Sumn. 243; *Commonwealth v. Porter*, 10 Met. 263; *Commonwealth v. White et al.* 10 Met. 14. Best, Ch. J., in *Levi v. Milne*, 13 E. C. L. 396.

HALL, J. This is an indictment for dealing in the selling of distilled spirituous liquors without license, on which the respondent was found guilty in the county court, and the case is brought here by bill of exceptions. The first objection made to the ruling of the court has been disposed of in favor of the verdict by our decision in the case of the *State v. Smith*, 22 Vt. 74, and I have nothing to say in regard to it. The other question is of much importance, and deserves serious and careful consideration.

The court, upon the request of the respondent's counsel to charge upon the point, charged the jury in substance, that, in determining the case submitted to them, they were not the judges of the law, but of the facts only; and that they were bound to consider the law as laid down by the court to be the law of the case, and were bound to be governed by it in rendering their verdict. We are now to inquire into the propriety of the charge. It is not denied by those who would sustain the charge of the court, but that the jury, in all the criminal trials, have the power to disregard the law, as laid down to them by the court, and to render a verdict of not guilty contrary to it. Nor is it pretended, that there is any power in the court, or any other tribunal, to set aside the verdict for any difference of opinion between the court and the jury in regard to the law, or in any manner to call the jury to account for rendering it. It is, however, insisted, that the jury are nevertheless legally bound to take the law of the case

from the court, and that by departing from it they would both violate a principle of law, and be guilty of a moral wrong.

On the other hand, it is claimed that the power, which a jury may in such case exercise, in rendering a general verdict, of determining the law and the facts of the case submitted to them, is a legitimate and legal power; a power which a jury, acting under their oath and governed by a sense of duty, may rightfully and properly exercise, although it be in contradiction to the law stated to them by the court. It must, I think, be conceded, that the opinion of the legal profession in this State, from the first organization of the government—certainly until a very recent period—has been almost if not quite uniform in favor of the now controverted right of the jury. From the earliest date, the supreme court, while they held jury trials in bank, were, as I have always understood, in the habit in criminal cases of charging juries, that they were rightfully the judges of the law as well as the facts; and I think the same has since been the general practice by the judges of the supreme court at *nisi prius*. The question in regard to the right of the jury was also incidentally before the Supreme Court in 1829, upon a charge of one of the judges at *nisi prius*, which it was contended, on the part of the respondent, was to be construed as having denied such right. It was conceded in the argument, that if the charge were liable to such construction, it could not be supported. The charge was held unobjectionable in that respect; but Prentiss, J., in delivering the opinion of the court, remarks upon the question as follows:—"There is no doubt, the jury are judges of the law as well as the fact. This is the true principle of the common law, and it is peculiarly applicable to a free government, where it is unquestionably both wise and fit that the people should retain in their own hands as much of the administration of justice as is consistent with the regular and orderly dispensation of it, and the security of persons and property. This power the people exercise in criminal cases, in the persons of jurors, selected from among themselves from time to time as occasion may require; and while the power thus retained by them furnishes the most effectual security against the possible exercise of arbitrary power by the judges, it affords the best protection to innocence." *State v. Wilkinson*, 2 Vt. 480. This opinion of a former chief justice of this State, of acknowledged legal ability and integrity, must be justly entitled to high consideration by this court.

The *right* as well as the *power* of juries in criminal trials to resolve both the law and the facts by their general verdict was also a favorite doctrine of the early jurists and statesmen throughout the United States, and continued such (as will be shown hereafter) until the contrary doctrine was broached by Mr. Justice Story in 1835, in the

case of the *United States v. Battiste*, 2 Sumn. 240. Since which time, the lead of Judge Story has been followed by the Supreme Court of Massachusetts in the case of *The Commonwealth v. Porter*, 10 Met. 263, and perhaps by judges and elementary writers in some of the other States. It is, however, worthy of remark, that in both the opinions of Judge Story and of the Supreme Court of Massachusetts, the principal reason for the establishment and maintenance of this right of juries,—the preservation of the liberty of the citizen, and the protection of innocence against the consequences of the partiality and undue bias of judges in favor of the prosecution,—is wholly overlooked. Even in the labored opinion of Chief Justice Shaw, in *Porter's case*, covering some twelve pages, it is not once even alluded to. The whole question is treated as resting on the comparative knowledge of judges and jurors in regard to the law, and in the supposed violation of the harmony of the legal system, which an admission of the right of jurors would occasion. These matters are doubtless worthy of consideration; but that which has been disregarded appears to me to be of no less importance. Judge Blackstone, in his Commentaries, (vol. iv. p. 349,) thus speaks of the trial by jury: — “The antiquity and excellence of this trial for the settling of civil property has before been explained at large. And it will hold much stronger in criminal cases; since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges, appointed by the crown, in suits between the king and subjects, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and trial by jury, between the liberties of the people and the prerogative of the crown.” Judge Story, in his Commentaries on the Constitution, section 1773, says, the trial by jury “was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and religious liberties, and watched with an unceasing jealousy and solicitude.” And the history of English criminal jurisprudence furnishes abundant evidence, not only of the necessity of such watchfulness, but also that the power of juries to determine the law as well as the facts in criminal trials was essential to the protection of innocence and the preservation of liberty. In trials for State offences, especially, the bias of the judges was always strongly in favor of the crown; and in most cases their partiality was such, that there was no security against the conviction of any person the government might accuse, but the independence and integrity of jurors. The question of the guilt or innocence of the accused being compounded of law and fact, it was in the power of the court to shape the law to meet the proof; and if the jury would but submit

to the direction of the judges in regard to the law, there was little or no chance for the escape of the prisoner, however weak the evidence might be. Of this numerous examples might be given; but they are too well known to the readers of English history to make it necessary to specify them.

It is this supposed independence of jurors in criminal cases, that has commended the English system of jury trial to the favor and eulogium of enlightened foreigners, and has procured its introduction into some of the more liberal governments on the Continent. The celebrated De Lolme, in his work on the Constitution of England, which he appears to have thoroughly studied, published in 1784, holds the following language:—"As the main object of the institution of the trial by jury is to guard the accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle, that the opinion which the judge delivers has no weight, but such as the jury choose to give it, but their verdict must, besides, comprehend the whole matter in trial, and decide as well upon the fact, as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law." P. 175. It is obvious, that the English system of jury trial would, in the estimation of this enlightened commentator, be shorn of its chief value, if the right of deciding upon the criminality of the fact proved were wrested from the jurors and transferred to the judges. Without, at present, dwelling longer on the reasons why jurors ought to possess the right, in criminal trials, to resolve by their verdict both the law and the facts which are embraced by the issue, I proceed to inquire more directly into the actual state of the English and American law on the subject.

The origin and early history of juries is involved in some obscurity; though I apprehend there is little doubt, that at their first institution, the whole matter in controversy between the litigant parties was heard and passed upon by their peers of the vicinity, without the observance of any practical distinction between the law and the facts of the case. But when, by the progress of civilization, courts assumed a more regular form, and controversies became complicated and difficult, questions of law, by the introduction of special pleading, were withdrawn from the jury, and placed upon the record for the determination of the court. If the pleadings ended in demurrer an issue of law was formed for the decision of the judges; if they terminated in an issue to the country, it was to be resolved by the jury. So, also, any questions appearing upon the record on motion in arrest, or placed there by special verdict, or demurrer to evidence, or bill of exceptions under the statute of Westminster 2, c. 31, were

to be adjudged by the court. The boundaries of the respective provinces of courts and juries, as well in civil as in criminal cases, were anciently marked and distinguished by the character of the questions, which were thus placed upon the record. Neither branch of the triers was allowed to invade the province of the other; and the right of the jury to determine the whole issue committed to them is believed to have been as perfect as that of the judges to decide the issues that were referred to the court. The maxim, "*ad questionem facti non respondent judices, ad questionem legis non respondent juratores*," had reference to the questions which appeared upon the record; and the ancient meaning of it was, that the questions of fact thus raised should not be answered by the judges, nor the questions of law by jurors. The doctrine, that questions of law, which might incidentally arise in the determination of an issue of fact, could be separated from the fact and left to the decision of the court, otherwise than by a demurrer to the evidence, or the finding of a special verdict, is of comparatively recent origin. It was unknown to the ancient common law, and has grown out of the modern practice of granting new trials for a difference of opinion between the court and jury upon questions of law arising on the trial, and is, doubtless, a legitimate consequence of the exercise of such power.

This power of granting new trials in civil actions, on the report of the judges of the proceedings at the trial, was first exercised by the Court of Common Pleas about the middle of the seventeenth century; previous to which time it appears to have been well understood, that the jury were alone responsible for any error of law in their general verdict, and, consequently, had the right to determine it in conformity to their own judgment. Upon this point the historical evidence appears to be full and complete.

The first authority, to which I would refer in support of this position, is the statute of Westminster 2, ch. 30, passed in the reign of Edward I, A. D. 1285. The statute is as follows, viz.:—"The justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do show the truth of the deed, and require aid of the justices; but if they, of their own head, are willing to say that it is disseisin or not, their verdict shall be admitted at their own peril."* The reason assigned by Lord Coke for the passage of this statute, as would naturally be inferred from its language, was, "that *some* justices did rule over the

* The clause, as recited in 2 Co. Inst. 421, is in these words,—"Item ordinatum est, quod justiciarii ad assisas capiend' assignati non compellant juratores dicere præcise, si sit disseisina vel non, dummodo dicere voluerint veritatem facti, et petere auxilium justic'. Sed si sponte velint dicere, quod disseisina est, vel non, admittatur eorum veredictum sub suo periculo." And see Keb. R. 46.

recognitors to give a precise verdict without finding the special matters ;" by which they were compelled, whether they were willing or not, to take upon themselves the decision of the whole issue, and were thus made liable to an attainr for a false verdict upon any point of law involved in it, when they might desire to refer such point of law to the decision of the court. For their relief against this hardship, the statute provided, that they should not be compelled thus to decide the law against their will, but might, if they chose, find the facts by a special verdict, and thus place upon the record a question which should be answered by the judges. 2 Co. Inst. 422. Lord Coke, in his commentary on this statute, says, that it was in affirmance of the common law, and "that in all actions, real, personal, and mixed, and upon all issues joined, general or special, the jury might find the special matter of fact, pertinent and tending only to the issue joined, and thereupon pray the action of the court for the law; and this the jurors might do at the common law, not only in cases between party and party, whereof this act putteth an example of the assize, but also in pleas of the crown at the king's suit." *Ib.* 425. And to the same effect is *Dowman's case*, 9 Co. R. 12. If it had been supposed, at the time of the passage of this act, that the directions of the judges, given on the trial, in regard to the law, were binding upon the jury, and that they would have been excused from the consequences of a false verdict by following such directions, there would have been no necessity for the enactment of the statute; for the jurors would have been entirely safe in their decisions, by taking care to comply with the directions of the court. But such compliance not being sufficient, it was necessary for the security of the jury to provide that they might, whenever they chose, put the question of law upon the record by a special verdict, to be afterwards answered by the court.

Littleton, who wrote two centuries after the statute of Westminster. 2, recognizes the same right of jurors to determine the law involved in the issue tried by them by their general verdict, if they chose to do so, and points out the same relief from such responsibility, whenever they desired to shun it. In his *Tenures*, after speaking of the giving of a special verdict in an assize, he says, section 368, "In such case, where the inquest may give their verdict at large, *if they will take upon themselves the knowledge of the law, they may give their verdict generally, as is put in their charge*; as in the case aforesaid, they may well say, the lessor did not disseise the lessee, if they will." This right of the jury to withhold a special verdict, and to pass upon the whole matter in issue, is also fully declared by Lord Coke, a century and a half after Littleton's time. In his commentary on the foregoing section of Littleton, Coke says, "Although the jury, if they will take upon them (as Littleton here saith) *the knowl-*

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edge of the law, may give a general verdict, yet it is dangerous for them to do so, *for, if they do mistake the law*, they run into the danger of an attain; therefore, to find the special matter is the safest way, where the case is doubtful. Co. Lit. 228 b.

It seems evident from what has already been shown, that for a period of about 350 years, which preceded the publication of Lord Coke's Institutes in 1628, it was well understood, that the province of the judges did not extend to the determination of legal questions, which arose incidentally out of an issue of fact, but that for their proper decision the jury were alone responsible.

The power of courts to grant new trials in civil cases, for the reason that, in their opinion, the verdict of the jury was contrary to law, not having been recognized until since the days of Lord Coke, there was not, previous to his time, any mode of relief against an erroneous verdict, except by the proceeding of attain against the jury. *Slade's case*, Style, 138; *Wood v. Gunston*, Style, 466. By this process, brought by the party against whom the verdict was rendered, and to which the jurors were made parties, the case was, in effect, tried over again by a jury of twenty-four, and if the verdict were found false, it was set aside and the jury punished. That this falsity might be found in the decision of the law as well as of the facts involved in their verdict is not only necessarily implied by the language of all the authorities before quoted, but is directly affirmed by others. Thus, Chief Justice Hobart, in 1619, in *Needler's case*, Hobart's R. 227, says: "It will be hard to acquit a jury *that finds against the law*, either common or general statute law, whereof all men are to take notice, and whereupon verdict is to be given, whether any evidence be given to them or not. As if a feoffment or devise were made to one *in perpetuum*, and the jury should find cross either an estate for life, or in fee simple, against the law, they should be subject to an attain, though no man informed them what the law was in that case." This is clearly to the point, that the jury were liable to an attain for error in deciding the law involved in their general verdict. Nor were they protected from an attain by following the instructions of the judges in regard to the law, if the instructions turned out to be erroneous. This is distinctly laid down by Chief Justice Vaughan in *Bushell's case*, as follows: "Finding against or following the direction of the court barely will not bar an attain, but in some case the judge being demanded by and declaring to the jury what is the law, though he declare it erroneously and they find accordingly, this may excuse the jury from the forfeitures; for though their verdict be false, yet it is not corrupt; but the judgment is to be reversed, however, upon the attain; for a man loseth not his rights by the judge's mistake of the law." Vaughan's R. 145. So, also, if

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the jury disregarded the directions of the judge, they were not liable to an attaint if they determined the matter of law correctly. *Paramore's case*, Dyer, 301.

But that questions of law involved in an issue of fact were not anciently treated as questions to be answered by the judges, is further shown by the fact, that bills of exceptions would not lie for misdirection of the judges to the jury in point of law, while the process of attaint continued in use, and for the very reason, that the jury were responsible for the correct decision of such points of law upon that process. This fully appears from the case of *Chichester v. Phillips*, in Sir Thomas Raymond's Reports, 404, decided in 1680. In that case, which was ejectment, the defendant having introduced a will duly proved in the Ecclesiastical Court, and insisted that the probate was conclusive proof of its execution, the court declined so to direct the jury, but left it to them to find the fact upon that and other evidence. The jury having found against the will, and a bill of exceptions being allowed, a writ of error was brought in the King's Bench, when the judgment below was affirmed,—not because the court had instructed the jury correctly, but, in the language of the reporter, "because, though the evidence be conclusive, yet the jury may hazard an attaint, if they will." See, also, 2 Jones, 146, and Buller's N. P. 316. There would then seem to be no doubt, that it was anciently admitted to be the proper province of the jury in civil cases, to decide in conformity to their own judgment all questions, whether of law or fact, which were embraced in the issue committed to their charge. And this result of the authorities necessarily disposes of the argument against the right of juries, drawn from the maxim, *ad questionem facti non respondent iudices, ad questionem legis non respondent juratores*, inasmuch as it shows, that the maxim must have been understood to have reference alone to the questions, either of law or fact, as they stood upon the record.

The jurors, being anciently under no legal responsibility to the judges for the correctness of their decisions, either of the law or the facts of the case, might properly exercise their own discretion in their determination. But since motions for new trials and bills of exceptions have been substituted for the process of attaint, and courts have come to set aside verdicts, because the jury disregard the opinion of the judge upon questions of law embraced by the issue, and for misdirection of the judge, juries have been placed in a new relation to the judges. The court, by the modern practice, having power to revise the decisions of juries, and to order new trials for their neglect to follow the directions of the judge upon matters of law, it has consequently become their legal duty to comply with such directions. And the court, and not the jury, may now be properly considered as

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the judges of the law involved in an issue of fact in civil cases, though it was formerly otherwise.

Having shown that it was the proper province of the jury, by the ancient common law, to determine, according to their own judgment, the whole issue committed to their charge in civil cases, it cannot well be contended, that their authority could be less extensive in criminal trials. Indeed, if the common law had originally limited the power of juries in civil suits to the decision of the facts, and had placed them under the direction of the court in regard to the law connected with the facts, it might still be claimed with entire confidence, that no such limitation had been imposed in prosecutions for crimes. There are several important distinctions between civil actions and criminal prosecutions, which indicate very decisively, that whatever our English ancestors might have considered the power of judges over questions of law, embraced in the issue to the jury in the former, they must have contemplated their entire independence of the judges in the latter.

In the first place, there is a marked and important distinction between prosecutions for crimes and civil suits, in the authority by which they might be instituted. Any subject was at full liberty, at his own pleasure, to commence his action against a party, who he conceived had injured him in his person or property, and might freely prosecute his suit to final judgment and execution. But the king, with the aid of all the judges in the realm, could not put an individual on trial for a capital offence, without first obtaining the consent of the people of the county assembled to pass upon the case as a grand jury. And if, previous to their investigation of the case, the supposed offender had been arrested or committed to gaol, their refusal to countenance the prosecution would at once release him from imprisonment. After providing so fully for the consent of the peers of the subject to the very institution of a criminal prosecution against him, it cannot well be conceived, that the jealous framers of the common law would have immediately withdrawn its protection from him and transferred the power of determining his guilt or innocence to the servants to the crown. It may be here remarked, that this restriction on the very commencement of a criminal prosecution has been deemed so essential to the liberty of the citizen in this country, that a provision has been incorporated into the Constitution of the United States, and into the Constitutions of most of the individual States, "that no person shall be held to answer for a capital or otherwise infamous crime, but upon the presentment of a grand jury."

Again; the rules of pleading, which were anciently adopted, were designed to separate the law from the facts, wherever it was deemed

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practicable, for the purpose of submitting the former to the judgment of the court, and leaving the latter to the determination of the jury. In civil actions, if the defendant could not deny the facts on which the suit was founded, he was obliged to place his defence upon the record by special plea, which pleading usually ended in demurrer, forming an issue of law for the decision of the court. If the defendant in such case pleaded the general issue, the court would at once exclude his evidence, so that no power whatever was given to the jury to pass upon his defence. Under the ancient practice, in the old actions of debt, detinue, covenant, trespass, and replevin, a large portion of the questions arising in litigated suits were thus withdrawn from the action of the jury and submitted to the determination of the judges. But in criminal prosecutions the accused was never compelled to take his defence from the jury and submit it to the court by special justification, but might always put himself on the country for his general deliverance. It will be difficult, I think, to find a reason, why the rules of pleading, which were adopted in civil actions, were not extended to criminal prosecutions, unless it be in the design of the founders of the common law, that the right of passing upon the criminality of the fact, as well as upon the fact itself, involved in the general plea of not guilty, should, for the safety of the subject, be withheld from the judges, for the determination of the jury.

In the third place, the contrast between civil actions and prosecutions for crimes is most distinct and striking in the conclusive operation of the verdict in criminal cases. However the court may disapprove of a verdict of acquittal, they have no power, as in civil suits, to award a new trial. The security of the jury from all consequences in giving it is also full and complete. No earthly tribunal can revise their verdict, or call them to account for rendering it. That, after a verdict of not guilty in a criminal proceeding there exists no power to put the party again on trial for the same offence, is a doctrine too well understood to require to be sustained by authorities. The jury are also exempt from all questions in regard to its propriety. The process of attain, the remedy for a false verdict in civil cases, was never extended to verdicts in prosecutions for crimes. This, though there are some *dicta* to the contrary, was admitted to be the law by Lord Mansfield at the hearing of the Dean of St. Asaph's case, and is, indeed, established by authority beyond doubt or question. *Bushell's case*, Vaughan's R. 146; Trials per Pais, 274; 1 Chit. Cr. Law, 529, and cases there cited.

That attempts were made from time to time, and at various periods, by English judges, to encroach upon the rights of jurors to determine, in criminal proceedings, the whole issue committed to

their charge, is undoubtedly true. The attempts were, however, resisted, and the contest, carried on by the judges on the one side and the people on the other, constitutes a part, and not an unimportant one, of the great struggle between the prerogative of the crown and the freedom of the subject, which was protracted for so long a period in England, and which eventually terminated in the practical triumph of the latter. Some notice of the most prominent efforts of English judges to coerce and control the verdicts of jurors in criminal trials, and of the manner in which they were resisted, will, perhaps, serve to throw some light on the question involved in the present case.

The first attempts to compel jurors to give verdicts in conformity to the wishes of the judges were by fining and imprisoning them. In 1554, Sir Nicholas Throckmorton was tried for high treason before a Court of High Commission, Bromley, chief justice of England, presiding, and found not guilty against the charge of the court. Before the jury separated, they were sent by the chief justice to prison, where they remained several months, when they were released upon the payment of enormous fines, by which most of them were ruined. *State Trials*, 901. In the despotic reign of Philip and Mary, there could be no redress for this arbitrary act of oppression. In the time of Elizabeth, A. D. 1602, there appears to have been another instance of a jury being fined and imprisoned for giving a verdict of not guilty, on an indictment of murder against the charge of the court, and, so far as any thing is known, the injury remained without redress. *Yelverton's R.* 23.

During the succeeding reigns of the first James and Charles, the Court of Star Chamber, which consisted of privy councillors with two common-law judges, was in active operation, and drew within its jurisdiction complaints for libels, and sedition, and all offences against the government which were not punishable capitally. By the imposition of enormous fines, and the infliction of barbarous and ignominious punishments, through the instrumentality of this court, the crown was generally enabled to disgrace and ruin whoever it chose to assail, without calling upon jurors in the common-law courts to aid by their verdicts in bringing them to the block or the gallows. But when that arbitrary and odious tribunal was, in 1641, abolished by the Long Parliament, it became necessary for the government to resort again to the ordinary tribunals for the punishment of crimes, either real or pretended. The rights of jurors had by this time come to be pretty well understood, though they were not yet fully acknowledged by the ruling authority, whether it might be king or commonwealth. In 1649, a few months after the execution of King Charles, Lieut. Colonel Lilburne was indicted for high treason against "the

government by Parliament, without King or House of Lords;" and on his trial he argued to the jury, and read from Lord Coke's Institutes, to show that they were the judges of the law as well as the fact, and the jury acquitted him, against the charge of all the judges, who were clear for a conviction. The Parliament, having failed to convict, passed a special act, banishing him by name, and declaring that his return to England should be deemed felony, for which he should, on conviction, suffer death. He did return, and in 1653 was tried at the Old Bailey for felony, against the act by which he had been banished. A copy of the act of Parliament, duly certified, was produced, and Lilburne, who was in court, was fully proved to be the person named in it. The jury, however, against the charge of the court, held the act, under which he was prosecuted, to be illegal, and found him not guilty. They were afterwards severally called before the council of state and questioned in regard to their verdict, and their answers indicate a decided and manly determination to maintain their independence as jurors and freemen. The answer of one of them, as entered on the minutes of the council, will serve as a specimen of the whole. It is as follows: "Michael Rayner being asked, whether Mr. Scobel, clerk of the house, did not give evidence that Lieut.-Colonel John Lilburne, at the bar, was the very Lilburne against whom the act was made? He said, he did give that evidence, and that he did believe he said true, and that the copy of the act of Parliament produced, was a true copy." But saith, "that he and the rest of the jury took themselves to be judges of matter of law as well as of matter of fact; although he confessed that the bench did say they were only judges of the fact." 2 Hargrave's State Trials, 79, 80.

In the reign of Charles the Second, Kelynge, chief justice of the King's Bench, a pliant instrument of the crown, fined Sir Henry Wyndham and eleven others of a grand jury, because they would not find a bill of indictment for murder, telling them that the man having died at the hand of the party, it was their duty to find the bill, it being matter of law for the court whether it was murder or in self-defence. He also fined a petit jury, who refused to convict a party on an indictment under the conventicle act, and the next year imposed a fine upon another jury, who declined to follow his directions upon a matter of law. His own account of the latter case, as given in his reports, page 50, is as follows: "Hood was indicted for the murder of Newman, and upon the evidence it appeared that he killed him without any provocation, and thereupon I [Kelynge] directed the jury that it was murder, for the law in that case intended malice, and I told them they were the judges of the matter of fact, namely, whether Newman died by the hand of Hood; but whether

it was murder or manslaughter, that was matter of law, in which they were to observe the directions of the court. But notwithstanding, they would find it only manslaughter; whereupon I took the verdict and fined the jury, of which John Goldwier was foreman, £5 apiece." These illegal acts of the chief justice having (in December, 1667) been brought to the notice of Parliament, witnesses were examined, and he was heard in his defence, and the grand committee of justice reported to the House of Commons, that the proceedings of the lord chief justice in these cases were "innovations in the trial of men for their lives and liberties, and that he had used an *arbitrary and illegal power*, which was of dangerous consequence to the lives and liberties of the people of England." The committee also recommended that "the lord chief justice be brought to trial, in order to condign punishment, in such manner as the house should judge most fit and requisite." But he having petitioned to be heard at the bar of the house, and there making an abject submission, the matter, by the intercession of his friends, was suffered to drop without being further prosecuted. 6 State Trials, 992, 1019.

Only one other attempt to control the decisions of jurors by punishing them for unsatisfactory verdicts, will be mentioned. In 1670, the famous William Penn, together with William Mead, were tried at the Old Bailey before a court of oyer and terminer, the Recorder of London presiding, for a breach of the peace, in being concerned in a tumultuous and unlawful assembly. The proof was, that some two or three hundred persons had peaceably and quietly met in Grace street, London, and listened to the preaching of Penn. Penn contended, that there had been no breach of the peace; that the assembly was lawful; and he read from Lord Coke to the jury in support of his position. The court charged strongly and bitterly against the prisoners; but the jury disregarded the charge and returned a verdict of not guilty. There were no disputed facts, and there can be no doubt the jury decided the law correctly. The court, however, were in great fury with the jury, and immediately fined them forty marks each, and committed them to Newgate. Edward Bushell, one of the jurors, with a similar resolution to that of John Hampden in regard to the ship-money, refused to obtain his release by paying his fine, and brought his writ of habeas corpus to the Court of Common Pleas. It being returned upon the writ, that, being one of the jury, Bushell had acquitted Penn and Mead against evidence, and also "*contrary to the direction of the court in matter of law*," the question of the power of the court to control their verdict upon the matter of law was distinctly raised. The case was argued before eleven of the twelve judges, and their judgment was delivered by Chief Justice Vaughan, denying any such power of control in the

court, and vindicating the right of the jury to determine both the law and the fact by their general verdict; and *Bushell* was thereupon discharged. *Vaughan's R.* 135-158.

I am not aware that the independence of juries, thus sanctioned by the judgment in *Bushell's case*, has ever since been practically invaded, except in prosecutions for libel. Even in that class of prosecutions, the whole question of the guilt or innocence of the accused appears to have been submitted to the jury for a period of over fifty years after that decision. Among the instances in which this was done, was the trial of *Thompson*, in 1682; of the seven *Bishops*, in 1688, and of *Tutchin*, before Chief Justice *Holt*, in 1704. But, during the reign of *George the Second*, it began to be argued by some of the judges at *nisi prius*, that whenever the law could by any means be separated from the facts, in criminal trials, it should be determined by the court; that it could be thus separated in prosecutions for libels, because the libel was set forth in the information; and whether the matter charged to have been published was really libellous or not, was matter of law for the determination of the court. It was accordingly held, that the only questions to be submitted to the jury, were the fact of publication, and the truth of the innuendoes set forth in the information. Upon proof of these, the jury were required to render a verdict of guilty; leaving the question whether the publication was a crime or not for the subsequent decision of the court. 2 *Starke* on Slander, chap. xvi. This doctrine, which withdrew from the jury the whole question of the criminality of the publication, if it could have been firmly established, would have placed in the hands of the judges substantially the same power over political discussions, that had been so odiously exercised by the long suppressed Court of Star Chamber. It was adopted by Lord Mansfield soon after he took his seat on the King's Bench, and was followed by him in the trials of *Woodfall* and others; by Mr. Justice Buller in the *Dean of St. Asaph's case*; and on a motion for a new trial in the latter case, it was, in 1785, declared to be the law, by the unanimous decision of the King's Bench. *Rex v. Dean of St. Asaph*, 3 Term R. 429.

This doctrine of the King's Bench did not, however, meet the approbation of all the judges in Westminster Hall, and it was earnestly and vehemently opposed by most of the leading members of the profession, who, when employed for defendants, appealed from the judge to the jury in regard to their constitutional rights, and, in many instances, were successful in cases where, if the whole matter had been left to the jury, verdicts of guilty would probably have been obtained. This struggle against the alleged judicial invasion of the independence of juries continued from the time of *Woodfall's trial*, in 1770, till 1792, when the nation being thoroughly roused, the sub-

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ject was taken up in Parliament, and Mr. Fox's famous libel act passed, by which trials for libels were placed upon a like footing with other criminal prosecutions. Parliament refused to recognize the decision of the King's Bench as ever having been the law of the land, the preamble of the act declaring, that "*whereas doubts have arisen*" as to the competency of jurors in prosecutions for libels "to give their verdict upon the whole matter in issue," therefore, it was enacted that the jury might give such verdict, &c.

This controversy in regard to the rights of jurors was the occasion of the well-known attack of Junius upon Lord Mansfield, which, so far as it imputed corrupt motives to that distinguished and venerated magistrate, was unquestionably unfounded and unjust. Lord Mansfield was, doubtless, sincere in the belief, that such a doctrine, which had been acted upon by other judges previous to his time, was essential to the preservation of order and good government against sedition and licentiousness. It is difficult, however, to free him from the suspicion of partiality of feeling in this matter. He appears to have been a member of the cabinet when the prosecutions for libels against Wilkes, and also that against Woodfall, which he afterwards tried, were resolved upon, though it cannot well be supposed he would have participated in the deliberations in regard to them. After he ceased to be a member of the cabinet council, he long exerted great influence with the ministry, and was relied upon by them to defend their measures in the House of Lords, which he often did with consummate skill and ability. Unless he is to be considered as exalted entirely above the common frailties of human nature, it is scarcely conceivable, that he could have been entirely impartial in prosecutions, instituted and maintained by an administration with which he was so intimately connected. He would seem, indeed, to have been one of that very class of judges, against the effects of whose bias in favor of the government the independence of jurors in matters of law, as well as of fact, was originally designed to guard. It may be added, that, though the opinion of Lord Mansfield, in the Dean of St. Asaph's case, is ingenious and able, as is every thing that emanated from his powerful mind, yet it is nevertheless unsatisfactory. The intention with which the act is done must be an ingredient of every crime, and is, necessarily, a question of fact. By the rule adopted by the King's Bench, it is manifest, that the question of intent was withdrawn from the jury, and transferred to the court. To this extent, at least, the decision cannot be sustained by argument.¹

¹ NOTE BY HALL, J. One of the principal *authorities* relied upon by Lord Mansfield, in this case, was a *ballad*, stated to have been written by Mr. Pulteney, who was one of the supporters of the Craftsman, upon the occasion of the acquittal of the

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The libel act eventually passed the House of Commons without a division, and met with but a feeble opposition in the House of Lords. It was advocated in both houses on the ground that juries, in criminal trials, had the constitutional right to pass upon the whole issue, the law as well as the facts, and that this right, having been improperly invaded, ought to be restored to its former footing. 29 Par. Hist. 577, 741, 1404. Mr. Worthington, in his treatise on the Power of Juries, although he endeavors to maintain the general authority of judges to direct them in matters of law, admits that in cases of libel, "The extraordinary right to decide the law has been, by the legislature, expressly committed to juries;" p. 196. Now, the language in which this right has thus been, as Mr. W. says, expressly committed to juries, is found in the first section of the act, and is simply, "That the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue." It is, undoubtedly, true, that this does admit the right in the jury to decide the law as well as the fact involved in the issue; but it is precisely the same authority, that has always belonged to jurors in all other criminal trials, and has been exercised without question or objection ever since the judgment in *Bushell's case*. How the permission given to the jury in the libel act to pass upon the whole matter in issue can confer the power to judge of the law embraced in it, and the same permission which has always been given by the common law can be construed to withhold it, is to me incomprehensible. I apprehend, the same authority to decide upon all matters in the issue exists in both cases.

In this country the decisions of judges and the opinion of jurists and statesmen have been, until a very recent period, quite uniform in favor of the independence of juries in criminal trials. On the trial of

publisher of that paper by a jury, in a prosecution conducted by Sir Philip Yorke, Attorney-General, about the year 1732. The object of Lord Mansfield was to show, that even the opposition to the administration, at that time, of which Mr. Pulteney was the leader, concurred with the government, that the jury, in prosecutions for libel, had nothing to do with questions of law. The stanza from the ballad, as quoted by Lord Mansfield, was as follows:

"Sir Philip well knows, that his inuendoes
No longer will serve him in verse or in prose,
For twelve honest men have decided the cause,
Who are judges of facts, but not judges of laws."

It turns out, however, that Lord Mansfield's recollection of the ballad was erroneous, and that, as originally published, it was an authority on the other side of the question, the two last lines being:

"For twelve honest men have decided the cause,
Who are judges alike of the facts and the laws."

29 Par. Hist. 582. 5 Campb. Ld. Chan. 50. 6 Ib. 345.

Henfield, for illegal privateering, before Judges Wilson and Iredell, of the United States Supreme Court at Philadelphia, in 1793, Judge Wilson charged the jury, that they, in their general verdict, must decide both the law and the facts. Wharton's State Trials, 88. Judge Wilson had, previously, in a course of law lectures, delivered in the College of Philadelphia, maintained by argument and authority this right of juries in all criminal trials. 2 Wilson's Works, 366-375. The Sedition Act of 1798 furnishes the very strongest evidence of the sense of the profession, as well as of the people of this country at that time, upon this question. That act prescribed a punishment for libels on the government of the United States and its officers, and after providing, that the accused might give the truth of the libel in evidence, declared, that "the jury who should try the cause should have a right to determine the law and the fact, as in other cases ;" the words, "as in other cases," being a direct reference to a right, the existence of which was understood to be sufficiently well known to form a general rule of action. Judge Chase, of the United States Supreme Court, on the trial of Fries for treason, in May, 1800, charged the jury, that "it was the duty of the court, in that and all criminal cases, to state to the jury their opinion of the law arising on the facts; but that the jury were to decide in that, and in all criminal cases, both the law and the facts, on their consideration of the whole case." Chase's trial, by Evans, Appx. 12, 45. This opinion of Judge Chase is entitled to the more weight, from his well known bias in favor of the government in State prosecutions, for the undue manifestation of which bias, on this very trial, he was afterwards impeached before the Senate. On the trial of the impeachment, which took place in 1804, Mr. Tilghman, an eminent attorney of Pennsylvania, testified, on being inquired of, "that the usual practice in the courts in which he had been, was for the court to permit the counsel on both sides to argue the law to the jury at length," and after they finished, for the court to charge, and that "they generally informed them what, in the opinion of the court, was the law, but that the jury were the judges of the law and the fact." Chase's trial, 27. And this right of the jury, though the question in regard to it did not directly arise on the trial of the impeachment, appears to have been generally understood by the managers and counsel to be the settled law. Ib. 101, 109, 182, 242, 247.

On the trial of William S. Smith, before the District Court of the United States, at New York, in 1806, for being concerned in a military enterprise against the Spanish American provinces, Judge Talmadge charged the jury, that it was a well-settled rule of law, that the right appertained to them to decide the law as well as the facts, in criminal prosecutions, "but that the jury were not, therefore, above

the law; and that, in executing the right, they attached to themselves the character of judges, and as such, were as much bound by the rules of legal decision as those who presided over the bench." Trial of Smith and Ogden, 236. On the trial of Wilson and Porter, in 1830, for robbing the mail, Judge Baldwin, of the Supreme Court of the United States, after stating to the jury what he conceived the law applicable to the case to be, addressed them as follows: — "We have stated to you the law of this case, under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test, by which you will apply the evidence to the case; but you will distinctly understand, that you are the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly." Baldwin's R. 99.

In the State of New York, in 1804, in the case of *The People v. Crosswell*, 3 Johns. Cas. 337, for a libel on President Jefferson, the Supreme Court was equally divided upon the question, whether the intent of the respondent in making the publication ought to have been submitted to the jury; Judges Lewis and Livingston holding to the doctrine of Lord Mansfield, in the Dean of St. Asaph's case, and Judges Kent and Thompson being of opinion, that the whole issue was for the jury. The attention of the legislature of the State being thus called to the subject, an act was passed in 1805, which, after reciting that doubts had arisen whether, in prosecutions for libel, the jury had a right to give their verdict on the whole matter in issue, declares, that — "in any such indictment or information, the jury who shall try the same shall have a *right to determine the law and the fact*, under the direction of the court, in like manner *as in other criminal cases*;" thus, equally as in the case of the Sedition Act, furnishing most conclusive evidence, that the general right of juries to judge of both law and facts was understood to be settled and established. So important was the independence of juries in trials for libels deemed to be, that the provisions of the act of 1805 were substantially incorporated into the amended Constitution of the State in 1821; and similar provisions, implying the existence of the right of the jury to determine the law and the facts, in all criminal trials, will be found in the constitutions of many, probably of a majority, of the States of the Union. Indeed, the opposition to this generally approved doctrine seems to have been so isolated and inconsiderable in this country, as scarcely to have attracted attention, until it was brought into notice by Judge Story, in 1835, in the case of *Battiste*, before mentioned. The following State authorities are also in favor of the now controverted rights of juries: — *State v. Snow*, 6 Shep.

436; 2 Swift's Dig. 174; 1 Wheeler's Crim. Rec. 108, 269; *Ross v. Commonwealth*, 1 Grattan, 557; *State v. Allen*, 1 McCord, 525; *Holder v. State*, 5 Georgia R. 441; 5 Ala. R. 666; *State v. Armstrong*, 4 Blackf. 247, overruling *State v. Townshend*, 2 Blackf. 151, and 2 English R. 59.

In Massachusetts, as well as in the other States, the early doctrine appears to have been favorable to the independence of juries in all criminal trials; and so late as 1830, in the trial of Knapp for murder, the Supreme Court of that State, sitting in bank, acknowledged and declared the right of the jury to determine the law as well as the facts by their general verdict; and in 1837, in the case of *The Commonwealth v. Kneeland*, the same doctrine seems to be admitted. 10 Pick. 497; 20 Pick. 222. But in the case of *Commonwealth v. Porter*, decided by the Supreme Court in 1845, 10 Metc. 263, the previous cases on that subject were disregarded, and the right of the jury to differ from the court, in relation to the law, in making up their verdict, is denied. The court, however, seem to shrink from the consequences of their decision; for it is a singular feature of the case, that although the court held, that the jury must be absolutely governed by the law as laid down by the court, yet the verdict was, nevertheless, set aside, because the judge who tried the case refused to allow the counsel for the accused to argue the law to the jury. It would, therefore, now seem to be the law of Massachusetts, that it is an acknowledged right of the respondent's counsel to read his authorities, and argue the law fully to the jury; yet that, if the jury pay the slightest regard to the authorities or argument, they violate a settled principle of law, and are, perhaps, guilty of official perjury. I cannot but think that upon one or the other of these points, the Supreme Court of Massachusetts must be in error. The right of juries is also either qualified or denied in *Montgomery v. State*, 11 Ohio R. 427; *Pierce v. State*, 13 N. H. 536; *Montee v. Commonwealth*, 3 J. J. Marsh. 149; and *State v. Townshend*, 2 Blackf. 151, since overruled as before stated.

I will now proceed to notice some objections that have been made to the doctrine maintained in this opinion. The opinion of Chief Justice Best, in *Levi v. Milne*, 4 Bing. 195, was relied upon by the counsel for the State, to show that even in England the libel act has not been considered as conferring authority on the jury to determine the law involved in the issue of not guilty. Such appears to have been the language of that judge, not only in that case, but in the previous case of *Rex v. Burdett*, 4 B. & Ald. 95, [6 E. C. L. 358.] But in *Rex v. Burdett*, Chief Justice Abbott differed with him, and declared as his opinion, "that, the jury were at liberty to exercise their own judgments upon the whole matter in issue, after receiving

the opinion and declaration of the judge." Since the case of *Levi v. Milne*, the subject has undergone considerable discussion in England; and it appears now to be settled, against the opinion of Chief Justice Best, that the whole matter of the issue is for the jury. It is now held, that the judge is not bound to give his opinion to the jury, whether the publication be a libel or not, and that the whole question of libel or no libel is for their determination. *Fairman v. Ives*, 5 B. & Ald. 642; [7 E. C. L. 223]; *Baylis v. Lawrence*, 11 Ad. & El. 920; [39 E. C. L. 270.]

Mr. Worthington, in his work on the power of juries, refers to a few ancient authorities in support of the idea of there having formerly been a controlling power in the judges over the points of law embraced in the issue to the jury; none of which will, however, on examination, be found to sustain that position. Thus, he says, "it is most unequivocally declared by Glanville, that the assize could not decide upon the law connected with disseisin." And hence he would have it understood, that the statute of Westminster 2nd did not mean, as its language imports, that the jury might decide upon the question of disseisin by their general verdict. But the case put in Glanville, *lib.* 2, c. 6, by Mr. Worthington's own showing, was one in which the pleadings, which were then *ore tenus*, ended in an issue of law, and because it had thus become an issue of law on the record, the trial was withdrawn from the assize and transferred to the court. Worthington, 118. He also relies upon three cases in Plowden's Report's, viz., *Townshend's case*, p. 111; *Willion v. Berkley*, p. 223; and *Grendon v. Bishop of Lincoln*, p. 493. In the first case the jury found a special verdict, stating the facts at large, and then added their own conclusion in regard to the law. The very object of a special verdict being to submit the question of law to the court, it was very properly held, that the jury had exceeded their authority, and the court adopted their own conclusion upon the facts found. In the next case, one of the parties, in order to get his case to a jury, undertook to traverse a matter of law; but the court, in the language of Plowden, held, "that if the parties are agreed upon the matter of fact, they shall not traverse the law thereupon, as to say, the law upon this matter is with me, *without that*, that it is with you; but the judges shall adjudge upon it without traverse of the party." And the third case is to the same effect, that a party could not traverse matter of law, because that was to be decided by the court. Worthington, 119-124. In these several cases, the province of the court to determine questions of law is very properly insisted on; but in none of them is there any intimation, that the court could determine any question of law, which arose out of the issue on a jury trial. Indeed, the most thorough research in favor of the restricted right

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of juries has not brought to light a single ancient authority, which countenances the existence of such a power in the court, even in civil cases, while the remedy for a false verdict by attain was in use; nor a single authority which contravenes in the slightest degree the doctrine laid down by the plain language of the statute of Westminster 2nd, of Littleton, and of Coke, that the jury, by a general verdict, decide upon the law as well as the fact included in the issue. While, on the other hand, the doctrine of the statute, sanctioned by those venerated expounders of the ancient law, has been shown to be in accordance with cotemporaneous decisions and practice. It may not be wholly out of place to add, that this view of the right of jurors is sustained by the learned Mr. Hargrave, in his commentary upon the maxim *ad questionem* in Coke's Institutes, and also by Mr. Chitty in his approved treatise on criminal law. Co. Litt. 155, note 276; 1 Chitty Cr. L. 637.

It has been claimed, that the allowance of bills of exceptions in criminal cases is inconsistent with a right of the jury to pass upon the whole matter in the issue tried by them. It is, doubtless, true, that the doctrine of bills of exceptions proceeds upon the presumption, that the directions of the judge in matters of law are followed by the jury to the extent to which such directions are made subject to the revision of the court; and to that extent the law involved in such issue may be conceded to be under the control of the court. But the limited extent to which the remedy may be applied, furnishes an argument in favor of, rather than against, the controverted right of juries. Bills of exceptions were unknown to the common law, and in England were authorized by the statute of Westminster 2nd, c. 31, which has been uniformly held to apply only to civil suits. Neither in England, nor in the federal courts of the United States, was there ever any remedy by bill of exceptions in criminal cases. 1 Chit. Cr. Law, 622; *United States v. Gibert*, 2 Sumn. 104. The remedy, wherever it exists, is founded on the local statutes of the several States. In this State, the accused party, in case a verdict of guilty is returned against him, may file exceptions to any decision or ruling of the judge upon the trial, and carry the matter of law to the Supreme Court. But no provision is made for exceptions in behalf of the State, and a verdict of acquittal is beyond their reach.

It is most obvious, that this remedy does not deprive the accused of any privileges, which he had before enjoyed, but was designed to furnish him with a new and additional security against the danger of an illegal conviction. To the protection which the common law had provided, that before the accused should be subjected to punishment for a crime, there should be a verdict of his equals, that in fact and in law he had been guilty of it, the statute superadded the fur-

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ther security, that the decision of the jury against him should not have been adduced by such action or advice of the court, as, in the opinion of the superior tribunal, was contrary to law. The effect of the remedy is, not to deprive the jury of the right, in favor of the prisoner, of determining the law, but to render a concurrence in opinion of both the court and the jury, in regard to the law, necessary to his conviction and punishment. The modern practice in England of granting new trials in cases of misdemeanors, where, in the opinion of the judges, the verdict is against law, produces the same effect as our bills of exceptions. A new trial is never granted on application of the crown, but only on that of the prisoner, after a verdict of guilty. It furnishes the accused with an additional shield for his defence, but takes from him no previous right. Both bills of exceptions and new trials are similar in their operation to a motion in arrest of judgment. They are all applied after a verdict of guilty by the jury, and all operate as additional securities against his illegal and improper punishment. When the legislature of a State shall become bold enough to provide by law, that exceptions may be filed in behalf of the prosecution, and a verdict of acquittal set aside and a second trial awarded, for the reason that the jury disregarded the instructions of the judge upon the matter of law, then, and not till then, can an argument be raised from the law of exceptions against the right of juries in favor of the prisoner to determine both the law and the fact involved in the issue.

The alleged unfitness of jurors to decide questions of law has been urged as an argument against their legal right to make such decisions; and though the argument must necessarily be inconclusive, it may, nevertheless, be proper to notice it. It is undoubtedly true, that judges are presumed to be possessed of legal learning greatly superior to that of jurors, and in that respect to be much more competent to decide legal questions. It is to be noticed, however, that the question involved in an issue of not guilty of a crime are seldom, if ever, of a complicated or difficult character. They relate to the sufficiency of the evidence to constitute the crime charged in the indictment;—as whether the proof is sufficient to show that the party accused has committed the crime of murder, of manslaughter, of theft, of perjury, of arson, &c.; which questions, with the aid of the arguments of opposing counsel, a jury, even without the advice of the court, would ordinarily have little difficulty in determining rightly. But experience proves, that juries habitually show a respectful deference to the advice of judges upon points of law arising on a trial, and that the examples of their resisting such advice are not of common occurrence. And when such instances happen, they are not always from the fault of the jury. Indeed, if a judge conducts a trial in a fair and impartial

manner, and, paying a just regard to the rights of the jury, advises them intelligibly and correctly upon the matter of law, he will seldom find occasion to complain of their disregarding his counsel.

But freedom from partiality and undue bias is essential to the just decision of legal questions, as well as law learning; and though jurors might, from want of legal information, sometimes improperly acquit a guilty party, yet such acquittal would be a much less evil than the conviction by a partial judge of one who was innocent. The decisions of successive juries are not likely to be wrong, except in occasional instances; while one decision of a court, forming a precedent for another, would, if erroneous, produce a continuance in error. In this respect, the danger in criminal prosecutions would be greater from trusting too much to the judge than to the jury. The objection to the fitness of jurors to decide questions of law was as forcibly stated by Lord Mansfield in the *Dean of St. Asaph's* case, as it has been since, or perhaps ever can be. His argument, however, failed to convince the nation of the correctness of his decision, excluding the law of libel from the consideration of the jury. The nation, by their representatives, gave full evidence, that they preferred the security furnished to the liberty of the subject by the right of the jury to judge of the law in each individual case—imperfect as their judgment might be—to the dangerous uniformity and harmony of successive convictions, registered by order of the judges.

Notwithstanding the extended consideration, which I have deemed it proper to give the question of the right of juries to determine the whole issue in criminal prosecutions, I think the right may be successfully maintained on much narrower grounds. The power of juries to decide the law as well as the fact involved in the issue of not guilty, and without legal responsibility to any other tribunal for their decision, is universally conceded. *In my opinion, such power is equivalent to right.* Lord Mansfield, perceiving the want of all power to control the decision of the jury, admits, in the *Dean of St. Asaph's* case, that the distinctive province of the court over the law involved in an issue to the country can only be preserved by the honesty of the jury; and Mr. Justice Ashurst compares the power of the jury to pass upon the law in such case, to that of a man with a pistol at your head, who has the power to take away your life, though not the right. That there is a distinction in morals between power and right is undoubtedly true, and such distinction may not be inaptly illustrated in the case supposed. But this distinction has no application to questions of political power. Where the political power which rests in a State is distributed by the constitution or laws among the different officers or departments of the government, the very distribution or assignment of the power implies, that it may be lawfully and

rightfully exercised. Indeed, the very object of conferring the power is, that it may be thus exercised. The king, by the unwritten constitution of England, has the sole power of declaring war. This power, though not founded on any statute, has existed for ages; and though sometimes complained of, has never been declared illegal. It will not be denied, that this power in the king is a legal right; and yet the only evidence, that it is so, is to be found in the continued existence of the power, without authority in any other branch of the government to interfere with its exercise. The power of the jury is of the same character. Why should the right accompany the power in the one case and not in the other? The reason given, why the power of the jury cannot be considered as a right, is their unfitness for its proper exercise. This, however, is matter of opinion. The unfitness of the king for the exercise of the war-power might appear equally strong to many minds, and might be urged with much force against the propriety of his being allowed to exert it. I apprehend Lord Mansfield would not have listened very patiently to such an argument against the constitutional right of the king to declare war; and yet, it is the very argument by which he would convert the exercise of a power of the jury, which has existed from time immemorial, into a wrong. In both cases, the argument, from unfitness, rests on assumptions, which, if they were true, might furnish good reasons for withdrawing the power altogether; but the fact, that the power has been suffered to continue for ages without having been withdrawn, ought to be conclusive evidence, that it was allowed to remain for the purpose of being exercised. If the power of determining the whole issue in a criminal prosecution, upon a plea of not guilty, had been expressly conferred on the jury by statute, and the court, by the same statute, had been prohibited from questioning in any manner the propriety of the verdict, it would scarcely be pretended, that the statute did not confer on them the right as well as the power. Such we have already seen is the admitted effect of the English libel act. And is not the power equally a right, which has to the same extent been exercised for centuries by the authority of the common law, and which power, though sometimes questioned, has always been vindicated and maintained?

This power of a jury is doubtless liable to abuse; and so is the power conferred on a court, or on any other human tribunal. But while a jury or court keep within their proper sphere of jurisdiction, they are in the exercise of the powers conferred on them, and are in the performance of a legal right; and this though they may, by the abuse of the power, be guilty of a moral wrong. The extent of the jurisdiction of a court or jury is measured by what they may or may not decide with legal effect, and not by the correctness or error of

their decision. Thus the butcher Jeffreys, by virtue of his office as judge, had the political power, and consequently the legal right, to conduct the trial of Algernon Sidney, and to give his opinion upon the law of the case in his charge to the jury, though for his shameful abuse of the right he may have incurred the deepest moral guilt. So the jury, in a criminal trial, have the legal right to decide the law as well as the fact involved in the issue; but this does not give them a right, by a wanton disregard of law, to decide arbitrarily. They are as much bound to exercise their best judgment and discretion in determining the law, as a court is; and they are held by an equally strong obligation to do so. The oath which is administered to them, "that they will truly try and true deliverance make between the State and the prisoner at the bar, according to the evidence given them in court, *and the laws of the State*," embraces the whole matter in issue, and binds them equally with the judges to perform their duty faithfully and conscientiously.

I conclude, then, that when political power is conferred on a tribunal without restriction or control, it may be lawfully exerted; that the power of a jury in criminal cases to determine the whole matter in issue committed to their charge, is such a power, and may therefore be lawfully and rightfully exercised; in short, that such a power is equivalent to, or rather is itself, a legal right. I am aware, that the causes, which in England rendered the establishment of this right of juries indispensable to individual safety, if they now exist in this country, must be conceded to operate with comparatively slight force. It may be, that there is not in this State, at present, any undue bias in the court in favor of the government, in criminal prosecutions. But of this, it does not perhaps, become the judges to speak. It may be, that there is no just cause for the apprehension of such an evil in future. If, however, it be wise and expedient to declare, that there shall no longer be any check to the possible exercise of this undue bias by the judges, it should be done by legislative determination, not judicial decision. If the legislature desire, that juries should hereafter take the law in criminal trials from the court, they can readily say so, and prescribe a mode for carrying their will into effect. Until they do so, I shall be disposed to abide by the law as it has come down to us from our ancestors.

There being error in the charge of the county court to the jury, the verdict is set aside and a new trial granted.

BENNETT, J., dissenting.

The question mainly discussed in this case is important; and as I do not concur in the opinion expressed, I shall state somewhat at length the grounds of my dissent.

But before I proceed to the main question, I would observe, that let that be disposed of as it may, it appears to me to be an anomaly in judicial proceeding to reverse the judgment of the court below, on this bill of exceptions. The court, it appears, charged the jury correctly *as to the law of the case*, and to the satisfaction of the respondent; but the complaint is, that, after this, the court told the jury in substance, that they must take the law of the case from the court, and that the jury were only to determine the facts. The case itself was, then, correctly tried, and the conviction legal,—it being had under a charge satisfactory to the respondent, as to the merits of this particular case. Why, then, should this court open the case for a new trial, unless it be to give the respondent an opportunity to have another jury acquit him contrary to law? The charge of the court, that they were the judges of the law, and not the jury, may well be considered, in this case, as theoretical; and if wrong, no injury was done to the respondent.

Upon a second trial, the court, as to the law of the case, would be bound to give the jury the same instruction, perhaps I should say advice, and the jury should follow it, if sound, notwithstanding it be held that they are the paramount judges of the law; for no one will contend, I think, that the jury have the right to disregard the law; and if they did, it would in effect be a mis-trial, and an acquittal against law. If this court open the case, it should be, I conceive, for an injury done to the respondent himself, and not because it may be thought the court below advanced an untenable opinion, as to who were the ultimate judges of the law. This case was not brought up, I take it, for the purpose of redressing any wrong done to the jury, by the court having invaded their province. The respondent is the only party complainant on the record, and the question is, has he been injured from any thing which appears upon the record, though it be granted, that the instruction given to the court below should have been simply as advice? If a judge in a civil case should give a jury wrong instructions as to the law, and the jury should find contrary thereto, and it should appear, upon the hearing for a new trial, that the judge was wrong and the jury right, the court will not grant a new trial, for the reason that it would be putting the parties to trouble and expense, to no good purpose. This is settled law. Though we treat proceedings upon bills of exceptions as proceedings in error, yet the court will look at the whole record; and if upon the whole record they can see that the judgment was right, they will not reverse it, though some error may have intervened on the trial. See *Wood v. Scott*, 13 Vt. 49, and *Morse v. Crawford*, 17 Vt. 499. To hold otherwise would be useless trifling. In the case at bar, the whole record shows, that the conviction was right,—the respondent

being satisfied with *the law of the case*, as given to the jury. I apprehend, that it will not be contended, that there can be any well grounded distinction, in this respect, between civil and criminal cases; and I am quite at a loss for reasons which should induce me to reverse the judgment below, though I were to concede the question, that the jury in criminal cases are the paramount judges of the law.

But the important question argued and decided in this case, though as I think unnecessarily, for the reasons already given, is this, — is the duty of passing definitively upon the law, in a criminal case, imposed upon the jury, or does it rest upon our courts?

When we speak of the right of the court, or of the jury, to pass upon the law in a criminal case, there is evidently an inaccuracy in the use of language. So far as the public, or the accused is concerned, it becomes a duty upon the one or the other of these tribunals to decide the law; and it is equally the right of the public, and of the accused, to demand a performance of this duty from that organ in the administration of justice, where the duty is constitutionally and by the laws of the land imposed; and the performance of this duty is imperative, and cannot be cast off at pleasure. If the jury are the paramount judges of the law, the government as well as the accused, must have the right to call for a discharge of this duty, unless we run into the seeming absurdity that the jury are the judges of the law for the accused only. When we speak of the performance of this duty, in relation to the court, or jury, it may properly enough be said to be a right in the one, or the other, dependent upon and growing out of their duty.

I shall attempt to maintain, in the first place, that, upon authority, and the true principles of the common law, it was not a duty imposed upon the jury to overrule the court upon a criminal trial, upon questions of law, though they might differ from them, but that they ought and are bound to apply the law, as they have it in charge from the court, to the facts of the case, as found by them, — though it may be, and is true, that if they acquit against the charge of the court, their acquittal is final. And in the second place, if there is a different doctrine established in England, and it is the duty, and, if you please, the right of the jury to decide both law and fact, in their general verdict, yet the reasons, which led to the claim of such a doctrine in England, have no place with us, and the genius of our government and the fitness of things should lead to a different result.

Before we proceed to an examination of principles and authorities, it may be remarked, that, if it can be sustained, that the jury are the paramount judges of the law, it is only for one purpose, and that is an acquittal. The duty is not imposed upon them, to place themselves in an antagonistic position with the court, for the purpose of convic-

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tion,—and indeed they cannot,—but only for acquittal. I am not one of those who are disposed to underrate the value of a jury trial, whether in civil or criminal cases; and I fully concur with Blackstone when he remarks, in his Commentaries, with great propriety, that the laws of England have placed a twofold barrier between the liberties of the people and the prerogative of the crown, viz., presentment and trial by jury; but he does not intimate, that to sustain this barrier in a proper manner, they must be in any sense judges of the law. Judge Story, in his Commentaries on the United States' Constitution, says, "the trial by jury was insisted upon by our ancestors, as the great bulwark of their civil and religious liberty;" yet he has maintained, in the most pointed manner, that the jury are not judges of the law. If, in times of difficulty and danger in the English history, there was reason to contend for the doctrine that jurors were judges of the law as well as the facts, as being necessary for individual safety, it must have arisen in times of high excitement, from the supposed or actual violence and partiality of judges appointed by the crown, in cases where the crown was a party, and not out of the supposed fitness of things; and if so, should a principle, unfit in the nature of things, and which arose under another government, and out of an abuse in the administration of justice, be retained after the cause which originated it has passed away? And more especially should it find a lodging place in this country?

I would premise, before entering upon the authorities, that in prosecutions for libels much angry discussion arose, as is well known, in regard to the intent with which the publication was made, as well as its tendency. While it was claimed, on the one side, that a criminal intent, flowing from an unlawful act, performed without any legitimate excuse, was an inference of law, on the other hand it was claimed with equal confidence, that in all cases the particular intent with which a publication was made, was as much a matter of fact, as the publication itself, and equally for the jury. The merits of this question are not now for examination. All I wish to say is, that those libel cases, where it has been submitted to the jury to find the intent with which the publication was made, and its tendency, upon the ground that they were an inference of fact, or a mixed question of law and fact, are not authorities to support the present decision of this court. I would also premise, that what may have been claimed by counsel, however eminent, in their captivating harangues to a jury, in exciting criminal trials, in regard to their being the paramount judges of the law, can have but little effect, in showing what the law truly was. The same may be said of pamphlets, and partisan essays, published in the heat of party excitement. And though there may be cases where the jury, as in the trial of Colonel Lilburne, "took

themselves to be judges of matter of law, as well as matter of fact," in opposition to the direction of the court, yet this cannot be regarded as any evidence of what the law was. It only shows that such a doctrine was contended for,—not that it was a principle of the common law. Blackstone tells us, "that the decisions of courts of justice are the evidence of what is common law; and that these are handed out to public view in the numerous volumes of reports." Let us then see what evidence is to be had, from this source, as to the true state of the law on this much litigated question.

In 1554, on the trial of Sir Nicholas Throckmorton for high treason, the jury were charged, in effect, by Bromley, chief justice, that they should take the law from the court; and the jury were even punished for disregarding their instructions. *State Trials*, 901. In *Wharton's case*, in 1602, *Yelv.* 24, the jury were fined for their verdict, and finding against direction. This was an indictment for murder, and the jury would convict only of manslaughter. This case shows, that the court then supposed the law to be, that the jury were bound by direction. Ch. J. Popham was then one of the judges. In 1649, John Lilburne was tried for treason; and when it was claimed, that the jury were the judges of the law as well as of the facts, Ch. J. Keble replied, "I tell you, in the opinion of the court, the jury are not the judges of the law." Justice Jermin, in his remarks, adds, "*the jury ought to take notice of it, that the judges, who are twelve in number, and who are sworn, have ever been the judges of the law, from the first time that we can ever read or hear that the law was truly expressed in England, and the jury only judges of matter of fact.*" 2 *Harg. State Tr.* 19, 70. Though this was a trial conducted with considerable warmth, and it is said high words passed, (the accused evidently being very contumacious in his manner,) yet this should not destroy the effect of the testimony of the judges, how they considered the law; and we cannot suppose them to be ignorant of the juridical history of the times in which they lived. In 1670, on the trial of Penn and Mead in the King's court of *Oyer and Terminer*, which was held for the city of London, the court claimed to be judges of the law, and in fact proceeded to punish the jury, because they gave a verdict against their directions. See 3 *Co. Litt.*, *Harg. Notes*, 155, n. 276; *Bushel's case*, *Vaughan's R.* 135. In 1678 we have *Hood's case*, who was indicted for murder. The killing was proved, without there being any provocation, and Ch. J. Kelynge charged the jury, "that this was murder, the law implying malice, and that this was matter of law, and that the jury were to observe the direction of the court, and that they only were judges of the facts;" yet the jury would convict only of manslaughter. Kelynge, 50. Though it has been said, that Kelynge was but a pliant instru-

ment of the crown, yet the law of that case has continued to be the law of England to the present day. In 1683, on the trial of Algernon Sidney, 3 Harg. State Trials, 818–19, the lord chief justice charged the jury, that the court were bound to declare the law to the jury, and that they were bound to receive their declaration of it. Justice Withins added, “we concur with my lord, the chief justice.” Though that trial was in troublesome times in the English history, and the chief justice a violent partisan in cases where the crown was concerned, yet it still furnishes evidence how the law was then understood in this one respect. In 1702, we have *Fuller’s case*, before Chief Justice Holt, 5 Harg. State Trials, 443. The charge of the chief justice excludes the idea, that the jury were judges of the law. He tells the jury, “You hear the witness say, that he (Fuller) brought the two scandalous books to the press, and that he corrected them, and he owns he was the publisher, and if you believe he did so, you are to find him guilty.”

Tutchin’s case, in 1704, was also tried before Lord Holt; 5 Harg. State Tr. 542. In summing up to the jury, Ch. J. Holt uses this language: “You are to consider, whether you are satisfied, that Mr. Tutchin is guilty of writing, composing, and publishing these libels;” and he closes by saying to the jury, “if you are satisfied that he composed and published these papers, you are to find him guilty.” This necessarily assumes, that the intent, with which the publication was made, as well as whether the papers were libellous, were matters of law for the court. It has been claimed, that in this case the whole matter was submitted to the jury. It is true, Lord Holt, in one paragraph of the charge, told the jury, “they are to consider, whether the words did not tend to beget an ill opinion of the government.” But it will be seen by a report of the case, that the counsel had been permitted to argue to the jury, that the papers in question were not libellous upon the government, and in fact that nothing was a libel, which did not reflect upon some particular person; and the chief justice, after showing to the jury the absurdity of the position of the counsel, follows with the remark to the jury, that they will consider the tendency of the words, &c. It is said by Lord Mansfield, in the case of the Dean of St. Asaph, that judges have sometimes expatiated to the jury upon the enormity of the libel, to remove the prejudices of the jury, and to obviate the captivating harangues of the defendant’s counsel, claiming that the jury can and ought to find that in law the paper is no libel. This was, perhaps, the object of Lord Holt, in the remarks he made,—and not that the jury should decide whether the matter was libellous or not. Unless we so understand the whole charge, taken together, the direction is not only inconsistent with a charge given by the same learned judge two years

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before, in *Fuller's case*, but with itself. But suppose he submitted the tendency of the publication to the jury; upon the ground that it was a mixed question of law and fact, — this would not sustain the position; that the jury were the ultimate judges of the law.

The case of *Rex v. Oneby*, 2 Str. 766, was in 1727, and came before the King's Bench, while Lord Raymond was chief justice. The indictment was for murder; and the whole court, as Lord Raymond states, "say, that in cases of this kind the judges are to determine what is malice, or what is reasonable time to cool; and they must do it upon the circumstances of the case; and the jury are only judges of the fact; and we must determine whether it be deliberate or not." Hence the court say, "in summing up the evidence, the judges direct the jury, if you find such facts, it is so, if not, it is otherwise; and they return either a general or special verdict." Under such a charge, though the questions of fact and law may be blended together by the form of proceeding, and cannot be separated upon the record, yet the distinction may well be preserved by the intelligence and integrity of the jury, notwithstanding they may elect to return a general verdict. Though in *Oneby's case* there was a special verdict, yet it is evident, that the judges did not consider that they were any more the judges of the law in such a case, than when both questions were blended together. It seems from the report of that case, that the practice of the courts in criminal cases to give *hypothetical* directions to the jury, was then well known. *Ld. Raym.* 1485. In the case of *King v. Clark*, in 1729, *Barnard.* 304, Serjeant Hawkins claimed to the jury, that the charge of a malicious and traitorous design was not made out by the evidence; and Chief Justice Raymond told the jury, that the fact of printing and publishing was only in issue to the jury.

Franklin's case was tried in 1731, 9 Harg. State Trials, 275, before Lord Raymond, which was a prosecution for publishing what was called the Hague letter; and the court charged the jury, that they had only to consider the question of publication, and the truth of the innuendoes; and whether the defamatory expressions complained of amounted to a libel, or not, was matter of law only, and of which the court are the only proper judges; and that they are not to invade one another's province; and that matters of fact and of law are never to be confounded. *Zenger's case* was tried in 1735, before the provincial court of New York; and though strong ground was taken, that the jury were the judges of the law, yet Chief Justice De Lancy modestly told the jury, that as the facts or words in the information were confessed, the only matter which could come in question before them, was whether they constituted a libel, and that was matter of law, which they might leave to the court. 9 Harg. State Trials, 297.

Owen's case was tried before Lord Chief Justice Lee in 1752, 10 Harg. State Trials, 196, and he told the jury, if the publication were proved, (there being no question as to the meaning,) they could not avoid bringing in the defendant guilty. This direction excludes the idea, that the jury could pass upon the law. *Nutt's case* was tried before Chief Justice Rider prior to 1756, while Lord Mansfield was attorney-general, and went to the jury under a charge, that they could pass only upon the facts, and the judges only upon the law. *Shebbeare's case* was tried before Lord Mansfield soon after he was appointed chief justice, in 1756; and he says, "his direction to the jury then was, and had been uniformly since, up to the time he gave the opinion of the court in the case of the Dean of St. Asaph, (1784,) that if the jury were satisfied of the publication, and that the meaning and innuendoes were as stated, they ought to find the defendant guilty,—leaving the question of law upon the record for the judgment of the court." In *Woodfall's case*, 5 Burr. 2661, tried before Lord Mansfield in 1770, the direction was the same in substance, and approved of by the King's Bench in bank. Lord Mansfield uses this language, "*we all again declare our opinion that the direction was right.*"

It has sometimes been claimed, that Lord Mansfield, in 1777, on the trial of John Horne, 11 Harg. State Trials, 287, advanced the doctrine, that the jury were the judges of the law. But, it is said, that case was reported from minutes taken in short hand at the trial; yet it is evident, take it as reported, that he did not intend to submit but two points to the jury, the publication and the meaning of it. In regard to what is said by Lord Mansfield about the seditious intent, he evidently speaks of it as a matter of fact, and to aid the jury in coming to a right conclusion as to the application of the matter charged to be libellous,—it being a question whether it related to his Majesty's government or not.

In 1784, the Dean of St. Asaph was tried for a libel before Justice Buller; and Lord Erskine, the great champion of the doctrine, that jurors are the judges of the law in criminal cases, was of counsel for the defendant, and warmly contended for his favorite doctrine; but he was overruled by Buller, Justice. See Lord Erskine's Speeches, p. 123. Buller told the jury, in the most explicit terms, "that whether the matter charged in the information was a libel or not, was a question of law for the court to pass upon, and not the jury." And he adds that he gave the same direction to a jury at the Guildhall sessions, not three weeks before that time, and says, "the law has been *so held* for more than a *century* past. The ruling of Justice Buller was fully sustained by the King's Bench. See 3 T. R. 428, n. a. 1 Ersk. Sp., p. 210. The argument of Erskine was able, and embraced about all that can be said on that side of the question; but the

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court thought it fallacious; and he could not induce them to overturn what they conceived to be the settled law. The opinion of Lord Mansfield in that case cannot well be surpassed. Lord Mansfield in substance declares, that the charge of Justice Buller was according to the uniform judicial practice since the revolution of 1688; and he adds, "such a judicial practice in the precise point from the revolution, as I think, down to the present day, is not to be shaken by general theoretical arguments, or popular declamation." Lord Mansfield had, at that time been for twenty-eight years chief justice of the King's Bench, and for many years before, had been solicitor-general, and also attorney-general, and most intimately acquainted with the juridical history of his own times and the preceding age; and he must have understood the true state of this controverted question better than it is possible for any man to do at the present day. He had the advantages of his own wide experience, traditionary intelligence, and manuscript notes of cases, and reported decisions; and the testimony of such a man, as to the true state of the law on this question, is not to be easily shaken. Buller, in his charge to the jury, says, "I do not know any question in the law, which is more thoroughly established, than that is. And that the law has been so held, for more than a century." The opinion of a man of Justice Buller's learning and experience should have no inconsiderable weight in regard to the judicial history of this question. No case has been cited, since the Dean's case, in England, showing that that case was not decided according to the uniform course of decision, and none to my knowledge exists. It was followed by Chief Justice Kenyon, 3 T. R. 428, in the case of *Rex v. Withers*, in 1789, and no question was raised as to its correctness. So, also, in *Stockdale's case*, in the same year, though Erskine was again counsel, and contended warmly for his favorite doctrine. 1 Ersk. Sp., p. 392.

In the trial of libel cases, the attention of the jury was confined to the question of publication and to the truth of the innuendoes in those cases *only*; in which there was no attempt at justification. If there was an attempt to justify, as was held in the Dean's case, it was for the court to tell the jury, whether the matter offered amounted to a justification in law, or not, and for the jury to find whether it was proved; and the jury were bound by the *direction* of the court. See 3 T. R. 428. The question of law in such a case does not arise upon the record, and can only be given *hypothetically in charge*; and the jury, as I think, are bound to follow their direction; though by a general verdict of acquittal they can, if they will, confound the law and fact, and follow their own caprices, *as to the law*, instead of the direction of the court; and this results from the fact, that courts will not grant new trials upon verdicts of acquittal,—for the best of

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reasons, as I shall hereafter attempt to show; as it would be but to do a nugatory act, and not because the jury were rightfully the paramount judges of the law. In an information for a libel, whether the matter charged is a libel, or not, is on the record, and may be tried on a motion in arrest after a verdict of guilty; and it is for this reason the court assumed the ground, that they were not bound to decide the question on the trial before the traverse jury, — and not because the verdict, in such a case, was a special one; though it may be said to be somewhat in the nature of such an one.

It has always been admitted, on trials for a libel, that in cases, where an innocent act is made criminal, when done with a particular intent, there the intent is the material fact to constitute the crime; and it is, of course, for the jury to find. But it has been maintained by high authority, that a criminal intent is an inference of law, from the doing of a thing in itself criminal, without a lawful excuse; while, on the other hand, it has been maintained, that the intent, with which an act is done, as well as the tendency of the libel, are in all cases questions of fact for the jury. It is not my purpose to examine the merits of this question. All that I wish to say is, that those libel cases, where it has been held, that the intent and the tendency should be submitted to the jury to find, upon the ground that they were in all cases questions of fact, or a mixed question, cannot be in point to show, that the jury were the judges of the law; while, on the other hand, the cases in which the court have refused to submit the intent or tendency to the jury, on the ground that they were an inference of law, are pregnant authorities to show, that the court denied the right of the jury to pass upon the law.

I propose to review, somewhat at length, the cases which have arisen in this country, and see how the weight of authority now stands here. In 1792 we find an essay from the very able pen of Judge Addison, of Pennsylvania, upon the duty of courts and juries, as to law and fact; and he maintains, that the jury have the right only to pass upon the facts in a criminal case, with great ability. See Addison's Charges to Grand Jury, No. 6, p. 53. In 1793 the question was raised on the trial of *John Bell* for murder. Addison's R. 156. The court tell the jury, they are the mouth of the law; and that it is their province to find the facts, and the province of the court to declare the law; and that no argument is more dangerous, than that, which must derive its force from the confounding of the authority of the court and the jury. In 1794 *McFall* was tried, also for murder; and in that case the court maintain the same doctrine, and tell the jury, "that what facts constitute one kind of homicide, or another, is a question of law purely; and when the facts are ascertained, nothing remains but a question of law, to be decided by the

court." Addison's R. 255. Both of these cases were tried on a plea of not guilty, and both of the respondents were found guilty of murder under the charge of the court, and both sentenced to be hung. I am not aware, that in Pennsylvania a different doctrine has ever obtained.

Though in *The Commonwealth v. Knapp*, 10 Pick. 497, and *Commonwealth v. Kneeland*, 20 Pick. 225, the opinion seems to be advanced, that the jury are the judges of the law in a criminal case, yet it is quite evident, that this opinion was thrown out without examination; and when this question came directly before the Supreme Court of Massachusetts in 1845, in the case of *The Commonwealth v. Porter*, 10 Met. 263, they repudiate the doctrine, that the jury are the judges of the law, as opposed to principle and reason. The case seems to have had the mature consideration of the court; still, I do not myself see any sufficient ground, why, under the decision of the court, the counsel for the defence should argue the law to the jury, as it was held they had the right to do. The only reason which occurs to me is, that, possibly, it might be supposed to aid the jury in applying the law to the facts found by them, as they should have it in charge from the court. [This was undoubtedly the true reason, for in the subsequent case of *Commonwealth v. Abbott*, 13 Metcalf, 123, in 1847, the same court said: "Upon questions of pure law, that part of the issue is not open to the exercise of the judgment of jurors, any further than this, namely, to exercise their best judgment in understanding the principles of law applicable to the case, as stated, qualified, and expressed by the court, and in applying them to the facts which are fully open to the exercise of their best judgment. And their duty is done by giving such a verdict as, upon the law thus stated, and the facts to be found by them, on the evidence applied by them according to the law, the law requires. *Commonwealth v. Porter*, 10 Met. 263. If it be asked, where then is the propriety of arguing the questions of law to the jury, the just answer is, that correctly speaking, questions of law, as such, are not argued to the jury. The mode of conducting a trial before the court and jury arises from necessity and convenience, from the obvious practical difficulty of adopting any other mode. The whole trial, embracing law and fact, and resulting in a general verdict, is necessarily conducted before the court and jury conjointly; and the law must be stated and explained by the counsel, first, for the consideration and decision of the court, and secondly, to enable the jury to apply the facts they may find, which they must do, in order to return a general verdict. But this course of counsel, in arguing questions of law before the court and jury at once, under the general direction of the court, no more implies that the jury may rightfully pass their judg-

ment upon the questions of law, contrary to the instructions of the court, than it does that the court may rightfully pass a defective judgment upon the questions of fact, upon the weight of evidence and the credit due to witnesses, against the judgment and conviction of the jury; which they clearly cannot.]

In New Hampshire, in 1842, two cases were tried;— *State v. Small*, and *State v. Pierce*, before Chief Justice Parker, both for a violation of the license laws,—in which he charged the jury, that the court were the judges of the law, and the jury were bound to take the law from the court. See Pamphlet Report of these cases. The case of *State v. Pierce* went to the Supreme Court, upon a writ of error, and the *direction* to the jury was sustained by the full bench; and the opinions are very able and do great credit to that court. *Pierce v. State*, 13 N. H. 536. In the case of *Townshend v. State*, 2 Blackf. 156, which was a prosecution for selling spirituous liquors without license, we find, in a very able opinion of Justice Holman, all the leading authorities and arguments fully and ably considered; and the result to which the court came, was, that the jury were not judges of the law, either in a criminal or civil case. The court say, “the jury are bound to find the law, as it is propounded to them by the court.” They may, indeed, find a general verdict, including both law and fact; but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oaths.” Blackford, J., dissented; and when the cases of *Warren v. State*, 4 Blackf. 150, and *Armstrong v. State*, 4 Blackf. 247, came up, the judges, who made the decision in *Townshend's case*, had left the bench, except Justice Blackford; and he and his new associates held, that, in criminal cases, the jury were the judges of the law;—thereby repudiating the doctrine of *Townshend's case*, and establishing his own dissenting opinion as the law of that State. With us the cases are to stand upon their own merit; and are only valuable, so far as they evince legal learning and soundness of views; and I am quite willing to leave these cases with the American bar. If I mistake not, (not now having the cases before me,) Justice Blackford rests his opinion solely upon the ground, that the jury have the power to decide the law under their general verdict; and hence he inferred they had the right. [No reasons at all are given in the cases from 4 Blackford, and the construction sometimes put upon them is certainly not supported by the courts of that State; for in the subsequent case of *Carter v. The State*, 2 Carter, 617, (1851,) before the same court, the judge on a trial for murder instructed the jury that they were the judges of the facts; but that it was their duty to believe the law to be as laid down by the court. To this, exception was taken by the prisoner, but it was said by the whole court to truly express the law; for it informed the jury

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that it was in their *power* to find a general verdict of guilty, or not guilty upon the whole case, but also admonished them that duty dictated they should take the law from the court. And the cases of *Pierce v. The State*, 13 N. Hamp. 536, and *Commonwealth v. Porter*, 10 Met. 262, are cited with approbation, and as saying all that need be said on the subject. Indiana, therefore, fails to sustain the position of Judge Hall, in *The State v. Croteau*.]

In 1830 the case of *Montee v. Commonwealth* came before the Court of Appeals in Kentucky, 3 J. J. Marshall's Rep. 132, upon a writ of error, complaining that the court had no right to instruct the jury as to the law in a criminal case. Though it is conceded in that case, that the jury are incidentally and in one respect the ultimate judges of the law, — that is, if they acquit, the judge cannot grant a new trial, no matter how much they have misconceived or disregarded the law, — yet the court say, they have no moral right to condemn and override the direction of the court; and they cite with approbation what was said by Wynne, in his *Eunomus*, in regard to the maxim, "*ad questionem facti*;" when he remarks, that the jury are the only judges of the fact; and he asks, is it not equally within the spirit of the maxim, that judges, only, have the competent cognizance of the law? See, also, *Montgomery v. State*, 11 Ohio, 427. The Constitution of that State provided, that in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. The court say, it would seem from this, "that the framers of our bill of rights did not imagine, that juries were rightfully judges of the law and fact in criminal cases, independently of the directions of the court. Their right to judge of the law is a right to be exercised only under the direction of the court; and if they go aside of that direction, and determine the law incorrectly, they depart from their duty and commit a public wrong, — and this in criminal as well as in civil cases.

In the case of *The United States v. Battiste*, in 1835, 2 Sumn. 240, 243, Judge Story states it as the opinion of his whole professional life, that the jury are no more the judges of the law in a capital or other criminal case, upon a plea of not guilty, than they are in every civil case tried upon the general issue; and though they have the physical power, yet they have not the moral right to decide the law according to their notions or pleasure; and he adds, "it is the duty of the jury to follow the instructions of the court."

The State v. Jones, 5 Ala. 666, (1843,) has been cited as an authority to sustain the decision of the court in the present case. It is said in that case that, "as the jury may find a general verdict in a criminal case, they are judges both of law and fact, and may, if they think proper, disregard the opinion of the court upon the law."

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This question came directly before the Alabama court, in the case of *Pierson v. State*, 12 Ala. 153, in which the doctrine of Judge Story is adopted as sound; and the case of *The State v. Jones* is explained and limited, and put upon what, I think, is the true ground, that is, that the jury have only the physical power to disregard the opinion of the court, if they will,—not the moral or legal right. In the case in 12 Ala. R. the court use this language: "The jury have no right to judge of the law, or control over it, except what grows out of their right to return a general verdict of not guilty." [And this doctrine was fully sustained in the late case of *Batre v. The State*, 18 Alabama, 119, (1850,) where the authorities are cited, and the reason for such a conclusion well stated by Dargan, C. J. "We know," said he, "it has been said by courts of respectable authority, that the jurors in a criminal case are the judges of the law as well as of the facts; but we think this opinion arises from not distinguishing between the powers that a jury may assume to exercise, and the duties confided to them by law."]

It has been supposed that the case of *Holder v. State*, 5 Georgia, 441, was in unison with the present decision; but upon a recurrence to that case, it will be seen, they have a statute, which enacts, "that on every trial of a crime, or offence, the jury shall be judges of the law and fact, and shall give a general verdict of guilty, or not guilty;" and the case is put exclusively on the statute. The case of *Patterson v. State*, 2 English, 59, also rests upon the Constitution of Arkansas, and a statute of the State, "which make the jury the judges of the law, as well as of the evidence." [See also the case of *Sandford v. The State*, 6 English, 328, (1850); *Bell v. The State*, 5 English, 536, (1850.)]

It is true, that Justice Baldwin, in the case of *The United States v. Wilson & Porter*, 1 Baldwin's C. C. Rep. 99, on the trial of Wilson, tells the jury, "they are, in a criminal case, judges of the law and fact, and are not bound by the opinion of the court; and if they should differ from the court, they must find their verdict accordingly." But when Porter's trial came on, page 108, same book, and the counsel, knowing what the court charged the law of the case to be on Wilson's trial, appealed from the court to the jury with masterly powers of intellect and eloquence, to induce them to override the decision of the court, Judge Baldwin seemed to be disposed to recede from the ground, which he had taken on the trial of Wilson. He here tells the jury, "if they acquit, the court cannot grant a new trial, though they differ from the jury as to the law; and in this respect they are judges of law, if they choose to become so; and that their judgment is final, not because they settle the law, but because they do not think it applicable, or do not choose to apply it to

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the case ; and that this is what is meant by the power of the jury to decide on the law." What Judge Baldwin on the first trial called a right in the jury, he here calls a power ; not because the jury settle the law, but because their judgment, if they acquit, is final. The case of *The United States v. Shive*, 1 Baldw. 510, was a prosecution for passing counterfeit money on the Bank of the United States. The ground assumed in the defence was, that the law chartering the bank was unconstitutional ; and when the counsel claimed, that the jury were the judges of the law, and pressed upon them the opinions of politicians, high in authority, — as to the unconstitutionality of the law, the court came out, and told the jury in the most authoritative manner, that this was not an open question, and was not for the consideration of the jury, and that the decision of the Supreme Court was binding both upon the court and jury. But, if it be true, that the jury are the judges of the law, and that there can be no legal conviction without the concurrent opinion of the court and jury in matter of law, against the accused, this is all wrong. Though the opinion of the Supreme Court might be binding upon the circuit judge, it could not be upon the jury ; and to admit that it would bind the jury would be to give up the question. The validity of the law was involved under the plea of not guilty ; and if the law was unconstitutional, the accused was not guilty of the offence charged in the indictment. Hence, if the jury are the judges of the law in a criminal case, they must, in passing upon the guilt or innocence of the accused, pass upon the validity of the law. The decision of the jury, if it may have that appellation, in no case settles the law, or becomes a rule of action for another jury, in a like case. The opinion of the Supreme Court is no more binding upon the jury, than the opinion of the circuit judge at the trial ; and if the jury had acquitted Shive against the charge of the court, it would have been final. They had the physical power to do it ; but, as I hold, this does not give the legal power, or moral right. If, upon the issue of not guilty, which may involve matter of fact, and, incidentally, matter of law, the accused has the right to have the jury pass upon the whole issue, the case of Shive cannot form an exception. To claim it would be, in effect, to abolish the rule contended for.

Judge Thompson, whose judicial learning and experience, while on the bench of the Supreme Court of New York and on the bench of the United States, were very extensive, thus wrote to a friend some short time before his death : " I have repeatedly," he says, " ruled on the trial of criminal cases, that it was the *right*, as well as the duty, of the court to decide questions of law ; and any other rule, it appears to me," he adds, " would be at war with our whole judicial system, and introduce the utmost confusion in criminal trials.

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It is true," he says, "the jury may disregard the instructions of the court, and in some cases there may be no remedy. But it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instruction."

In the libel case of *The People v. Croswell*, in 1804, 3 Johns. Cas. 337, which was tried before Ch. J. Lewis, he charges the jury in conformity to the law, as settled in England in the case of the *Dean of St. Asaph*; and upon a motion for a new trial for a misdirection of the judge, the question was argued before four judges, who were equally divided on the motion. Kent and Thompson, Justices, were for granting a new trial, and Lewis, C. J., and Livingston, J., were opposed to it. The ground assumed by Kent was, that the *intent*, in all cases, was an inference of fact, and in no case an inference of law; and this was probably the only ground upon which Thompson advised a new trial. Kent, however, argued, that the jury were the judges of the law, and must *resolve* both law and fact, upon a plea of not guilty, unless they chose to return a special verdict. The opinion of Kent, J., is able; but he is opposed by an opinion of the chief justice, equally able. The result of this division of the court was to deny a new trial; but no motion having been made for sentence on the verdict, until the statute of 1805 became a law, the court unanimously awarded a new trial. It has been said, that this act of the New York legislature furnishes conclusive evidence, that that body understood the law then to be settled, that juries were, in criminal cases, generally both judges of the law and the facts. But if it were so, I apprehend the opinion of the legislature would not be of the highest authority; I think, however, that no such conclusion is to be drawn from the act itself. It will be remembered, that in England the great contest in libel prosecutions was, whether the jury should find a defendant guilty upon finding the publication and the truth of the innuendoes, leaving the court to decide upon the question, whether the matter charged was libellous, upon a motion in arrest, or whether the whole should be passed upon by the jury upon proper instructions from the court, under the plea of not guilty. It was, I think, the only object of the statute to settle that controversy. The preamble to the act recites, that "doubts exist, whether, on trial for a libel, the jury have a right to give their verdict on the whole matter in issue." And the statute enacts, that the jury shall have a right to determine the law and fact, under the direction (not the advice) of the court, in like manner as in other criminal cases; and that they shall not be directed or required to find the defendant guilty, merely on the proof of publication and the innuendoes.

But how are they to decide the law? The statute answers, under the direction of the court; that is, they are under the direction of the

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court, as I understand it, to return a general verdict of guilty, or not guilty; and this verdict will necessarily be compounded both of law and fact; and in this sense, it may be said, that the jury resolve both law and fact. But does it follow from this, that the jury have a right to disregard the instructions of the court on the law, and set them at naught? If so, they do not decide the case under the direction of the court, but against it. It may indeed be said, that the term in the statute — direction — *ex vi termini* implies an obligation upon the jury to follow it. If, when the statute says, the jury shall have the right to decide both law and fact *under the direction of the court*, it was meant to create them the paramount judges of the law, it would seem to follow, that their decision should be final, whether for or against the defendant. But in the proviso the right to arrest the judgment is expressly reserved to the court, as it had been before practised; and I have no doubt, if the jury convicted the defendant against the charge of the judge, the court would grant a new trial; and this, I think, is exercising the right to resolve both the law and the fact under the same qualifications and limitations, as the jury could do in other criminal cases.

It is true, that upon the trial of *Stone* for a libel, in 1842, before Mr. Justice Kent, he seemed to think, that in that State, upon such a prosecution, the jury are the judges of the law and fact, and so charged them. But this I understand to be in consequence of the construction which he gave to a provision in their State constitution. The same accomplished jurist lays it down, in that very case, "that in all criminal cases, except those of libel, the law is laid down by the court, and the jury are merely the judges of the facts." And though the jury can exercise their power to bring in a general verdict of not guilty, against the charge of the court, and none can dispute it, yet he says, "it is their power, not their right." See the Report of *Stone's Trial* in the *New York Express* of May 17, 1842. In a recent case in the State of New York, *The People v. Pine*, 2 Barb. Sup. Court R. 566, in a capital case, the court charged the jury, in substance, that they were only to determine the facts; that the court were the only judges of the law, and that they were bound to take the law from the court; and under this charge of the court *Pine* was convicted, and was subsequently executed. [And in the subsequent case of *Carpenter v. The People*, 8 Barbour, 603, (1850,) Welles, J., said: "The idea which has become somewhat current in some places, that in criminal cases the jury are judges of the law as well as the facts, is erroneous, not being founded upon principle or supported by authority. Courts of record are constituted the sole judges of the law in all cases that come before them." And such seems now to be the established law in New York. See *The People v. Finnegan*, 1 Par-

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ker, 147, (1848); *Safford v. The People*, 1 Parker, 474, (1854,) overruling the earlier cases of *The People v. Thayer*, 1 Parker, 595, (1825); and *The People v. Videto*, Id. 603, (1825.)]

In *Dorr's trial*, in Rhode Island, for treason, the charge of the court was the same. See Pamphlet Trial, page —. And even in Texas, the conservative spirit of their courts have held, that in criminal trials it is the duty of the jury to look to the court for the law, and that the court is the only organ and expositor of the law. *Nells v. The State*, 2 Texas, 280. And in the case of *Handy v. The State*, 7 Missouri, 607, the court who tried the cause charged the jury, that they were the judges of the law and the fact; and a conviction followed; and upon a writ of error the judgment was for this cause reversed.

It has been said, that the Sedition Act of 1798 furnishes evidence of the sense of the profession, and of the people, at that early day, on this question, and shows that it was then understood, that the jury were the judges of the law. But I apprehend, that this argument is without force. The third section of the act of Congress of the 14th of July, 1798, after providing for the giving of the truth in evidence, proceeded to declare, that the jury should have a right to determine the law and the fact, *under the direction of the court, as in other cases*. The words, "as in other cases," cannot go to show, that a right existed in the jury to decide the law, and that this was so well understood, as to become a general rule of action. A provision similar has been introduced into several of the State constitutions, and, among them, into the Constitutions of Ohio and Kentucky. See *Montgomery v. The State*, 11 Ohio R. 427. The court say, speaking of their Constitution, that it could not be imagined, that the jury were judges of the law and fact in a criminal case, independent of the court; and if they go aside of their direction, and determine the law incorrectly, they commit a public wrong. In *Montee v. Commonwealth*, 3 J. J. Marsh. (Ky.) R. 151, the court say, "the provision in their State constitution clearly defines how the jury may determine the law and fact, and what shall be the province of the court; and that it presupposes, that in all cases, except libels, which it provides for, the court had a preëxisting acknowledged right to direct the jury as to the law, leaving the jury then to decide the whole case, compounded of law and fact." This is precisely what is done in a civil case, upon a plea of the general issue, when questions of law are raised on the trial.

I apprehend no argument can be drawn from the libel act, as it is called, of 32 George III., in favor of the general proposition, that juries are the judges of the law in criminal cases. The preamble recites, that doubts had arisen, whether, in prosecutions for libel, the

jury should give their verdict upon the whole matter in issue. The act provided, that they might give a general verdict of guilty, or not guilty, upon the whole matter put to issue on the indictment, or information, and that they should not be required to find the defendant guilty merely on proof of the publication and of the sense ascribed to the same. The second section provides, that the court, on every such trial, shall give their opinion and direction to the jury on the matter in issue between the king and the defendant, in like manner as in other criminal cases. The statute also provides, "that it shall not be so construed, as to prevent the jury, in their discretion from returning a special verdict as in other criminal cases." And the statute expressly reserves the right of the defendant, upon conviction, to move in arrest of judgment on such ground and in such manner, as he had the right to do, before the passage of the act.

Lord Erskine is said to be the father of this bill, though introduced by Fox, and seconded by Erskine; yet not one word is said about the jury being judges of the law. They are to give their verdict upon the whole matter in issue,—and how? Under the *direction* of the court, *as in other criminal cases*. And what matter is put in issue to the jury? The law is never proved or put in issue to the jury. Though in actions of tort, as in trover, matter of justification may be given in evidence under the plea of not guilty, and upon which questions of law may arise on the trial, yet they are not in issue to the jury. The plea is simply a denial of the declaration. So, to an indictment, matter of justification may be given in evidence under the plea of not guilty; and though the question, whether the matter set up in justification is proved, or not, is for the jury, yet its legal sufficiency is not in issue to the jury, any more than it would have been in a special plea. The provision in the act, that, upon conviction, the defendant may file his motion in arrest of judgment, is, in effect, a denial that the jury are to decide the law, simply because they pass upon the "whole matter in issue." The law can be no more in issue to the jury, upon an acquittal, than upon conviction. If, however, they acquit, there is no need of a motion in arrest. Chief Justice Best, in *Levi v. Milne*, 4 Bing. 195, 398, speaking of the libel act, though in a civil case, says, "I mean, however, to protest against juries becoming judges of the law, even in criminal cases. The act only says, they may find a general verdict." And he emphatically asks, "has a jury, then, a right to act against the opinion of the judge, and return a verdict on their own construction of the law?" "I am clearly of the opinion," he adds, "that they have not." See also *King v. Burdett*, 4 Barn. & Ald. 95, in which Chief Justice Best is very explicit, that the court are to judge of the law,

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in libel as in all other cases ; and that the statute only conferred upon the jury the right to find the intent, with which the publication was made. It would seem, however, from the case of *Baylis v. Lawrence*, 11 Ad. & El. 920, that a practice had been adopted in civil actions for a libel, to leave it to the jury, under all the circumstances, to say whether the publication amounted to a libel, or not ; and that this practice is analogous to the enactment of the libel act, which only relates to criminal cases ; but it has been treated as a declaratory act by some judges ; and the question, whether the publication was a libel, or not, has been regarded as a mixed question of law and fact, depending upon the nature of the publication and the intent with which it was made. On a motion in arrest, however, it becomes a pure question of law, whether the matter is libellous.

Some general considerations would seem to lead the mind to the conclusion, that it cannot be a reasonable or sound doctrine, that the jury are rightfully the judges of the law in a criminal case. The idea, that the law, which is supposed to be a certain rule of action, should be, on every criminal trial, what a jury of twelve men should be inclined to make it, subject to no control, or review, and liable to be perverted, through prejudice, and the popular outbreak of the day, has not, I confess, after mature consideration, received with me any special favor. It has never been claimed, that the jury have the right to judge of the law in a case, where the question of law arises upon the record ; and it must be admitted, that the jury, upon a plea of not guilty, are not the judges of the law for the purpose of conviction. If they convict, under improper instructions from the court, the defendant may have his exceptions and reverse the case upon error ; and if the conviction be against the direction of the court, the same court will order a new trial. This is as well settled in criminal as in civil cases,—and is conclusive, that the jury cannot be the judges of the law for a conviction. If at all, it must be only for acquittal ; and is it true, that jurors are the legitimate judges of the law for such a purpose ? Is such a doctrine necessary for the individual safety and security of the citizen ? I am not apprehensive a jury would often, if ever, go against the direction of a judge to acquit a prisoner in humble life, unless in a case involving some exciting topic, or where the law, which should be attempted to be enforced, might be deemed unpopular. It will be in the case of the rich and influential, where crime is sometimes found in its most appalling character, that a jury will be met with the choicest talents that grace the bar, and every effort made, which genius or sophistry can devise, to carry them away from duty, and to induce them, by the most captivating addresses, to take ground against what may well be supposed will be the direction of the court, under the plea, that they are the

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paramount judges of the law; and it will be more than hinted, that the court are prejudiced against the accused, and hence the necessity, that they should assert their right to decide the law. If the jury are the ultimate judges of the law, the exercise of this right should be cordially yielded to them. They should be fully addressed upon the law, which they are called to decide, and the authorities should be produced and read, and they should be fully possessed of the cases, and be enabled to compare them, one with another, and mark out the distinctions upon which they rest.

It would seem to follow, from the oath administered to the jury, that they are only to decide facts. It is the theory of most governments, that justice is to be administered under the sanctions of an oath. The judge is sworn to an impartial administration of the law; and in Hale's Pleas of the Crown, Vol. 2, p. 292, we have the oath, as administered to the jury in a criminal case, which is as follows: — "You shall well and truly try and true deliverance make between our Sovereign Lord, the King, and the prisoner at the bar, whom you shall have in charge, (and true verdict give,) according to your evidence."

There is no obligation, in this oath, imposed upon the jury to decide the law correctly; and they are not sworn to make that their rule of decision; but the only rule given them in the oath is, *according to their evidence*. If the jury decide the law, justice is administered, so far, without the sanction of an oath, — which contravenes the very principles of the constitution of the English government, as well as our own. The jury are sworn, "well and truly to try;" but should they be sworn thus to try matter of law, of which they are and must be supposed to be ignorant? The facts they can learn on the trial, but not the law. The facts are given in evidence, but not the law; and consequently the law is no more involved in the finding of a jury in a criminal case, under a plea of not guilty, than it would be in a civil case, under the same issue. The form of the oath administered to jurors, under our statute, gives the same rule, by which they are to be governed in making their verdict, in both civil and criminal trials. The rule, as expressed, is, "according to the evidence given them in court, and the laws of this State." No one supposes this oath binds, or authorizes, the jury to decide the law in a civil case; and can it be claimed, that it should any more in a criminal one? In both, they are to find their verdict according to the evidence, and the laws of this State; but how according to the laws of this State? clearly as they shall have the law in charge from the court.

It is conceded, that, upon demurrer, the court are the only judges of the law arising from the facts admitted on the record. But if the

jury are the judges of the law arising from the facts found by them, why not make them the judges of the law arising from facts admitted? Certainly it would be less embarrassing to them, than to decide both law and fact, when both were in dispute. It has been said, that, upon a plea of not guilty, the verdict of the jury is so compounded of law and fact, that the jury must necessarily decide both law and fact. But why so, any more than in a civil suit? The law and the fact may as well be kept separate, by means of a hypothetical charge, in the one case, as in the other. Lord Erskine, in his famous argument in the case of the Dean of St. Asaph, pushed this objection still further, and claimed, that the words and nature of a verdict, in a criminal case, necessarily import, that the jury are the judges of the law and fact, and that they must necessarily decide, both as to the commission of the act charged, and also as to its criminality, because, he says, if the act were not criminal, a verdict of guilty would be false. But this argument proves too much; for it is a conceded point, if the jury find the defendant guilty, against the charge of the court, their decision is not final, and the court will set the verdict aside. It may be further answered, that the jury, by a general verdict of guilty, find the facts to be true, which are alleged in the indictment, and so far as they are concerned they imply a crime, whatsoever the court may decide on a motion in arrest. Besides, a verdict of guilty is always to be understood provisionally, that is, guilty, if the facts are sufficiently stated in the indictment, and be such as constitute the crime attempted to be charged. If the verdict was not by implication provisional, the court in no case could arrest the sentence after a general verdict of guilty.

It is a rule apparently without exception, that issues of law are ever determined by the judges, and only issues of fact go to the jury. 1 Inst. 71 c. It is not claimed, that upon a plea of not guilty, the jury are the judges of the admissibility of evidence. But if they are the judges of the law, to be consistent, they should be. No question of law, in such case, is on the record; and whether a given state of facts is admissible in evidence depends upon what shall be held necessary in law, to make out the crime. The result, then, of the doctrine claimed to exist in this particular is, that the jury are the ultimate judges of the law, as to what facts must be proved, to make out the crime, and the judges decide what facts shall go to the jury. The only standard, which the court can have in relation to the admissibility of evidence, is, to determine in their own minds what is necessary to constitute the offence; and, upon the theory now adopted, the jury have the right to overrule them.

It is admitted, the jury may return a special verdict, and thereby refer all questions of law to the court. It was once doubted, whether,

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upon common law principles, the jury were not bound, if required, to return a general verdict; but the contrary is well settled; and the rule now holds without exception, both in civil and criminal cases, that the jury may, if they choose, return a special verdict. 2 Co. Inst. 422, 425; *Dowman's case*, 9 Co. 11 b, and 12; 1 Co. Inst. 227 b; Staun. P. C. 165 a; 2 Ld. Raym. 1494; Hargrave's Notes to Co. Litt. 155 b, n. 276.

We think this is conclusive, to show that the jury are not constitutionally the judges of the law upon a plea of not guilty, any more than upon a demurrer. If they are, the accused must have the right to demand that the jury should decide the law, and if not, he is deprived of a constitutional right. This cannot well be said to be a qualification of the right, which the accused may have, to call upon the jury to pass on the law. It is in effect an abrogation of the right; for how can that be called a right, which may at any time be denied by the very board, to whom the law has committed the security of this right, if it be one. If the defendant has the right to an acquittal, unless there is a concurrence of opinion both in the court and jury, that the law is against him, it is a sacred right; and it would be absurd to hold, that the jury could defeat him of this right by returning a special verdict, in their discretion.

If the jury, after finding the facts specially, also find their conclusion of the law from the facts found by them, this is not binding upon the judges; but they have the right to declare the law, as they conceive it to be, and thus control the verdict. 1 Hale's P. C. 471; 2 Hale's P. C. 302; Staun. P. C. 155 a; 4 Co. 42 b; Plowd. 114 a, b. This is also at war with the opinion, that the defendant has the right to be acquitted, unless both court and jury concur in opinion in matter of law against the accused. When the facts are settled, the jury cannot control the verdict.

Though a jury can acquit upon a plea of not guilty, against the charge of the court, from the form of the proceeding, yet does it follow, that they ought so to do? They may return a verdict of not guilty, in a civil suit, against the charge of the court; but no one supposes they ought to do it; and if they do, the court will grant a new trial. So if they convict in a criminal case, against the charge of the court, the same result will follow; but if they acquit, it is final; and from this it is supposed to follow, that the jury are rightfully the judges of the law in a criminal case,—though the advocates of this doctrine are constrained to admit, that it is for the simple purpose of an acquittal. I apprehend that the conclusion is altogether illogical. It is a maxim of the common law, as old as the common law itself, that "*nemo bis punitur, aut vexatur, pro eodem delicto*;" and this maxim has, in effect, been incorporated into the

Constitution of the United States, which provides, that no man "shall be put twice in jeopardy for the same offence." A liberal construction, as it should have been, has always been given to these provisions, in favor of the accused; and if the verdict be rendered upon such a proceeding, that, upon a conviction, the court might have legally passed sentence, upon an acquittal, in such a case, there can be no second trial, though the jury acquitted against the charge of the court, or through a misdirection of the judge. To grant a new trial, in such a case, would be but to give the accused an opportunity to use his former acquittal as a defence, and would be a useless and nugatory act in the court, which they will never do. This, I conceive, is the true reason, why the law has been settled, that no new trial can be had after an acquittal, though it is otherwise upon conviction; and the same reason has led the legislatures, who have passed laws providing for bills of exceptions on criminal trials, to confine this right to the defendant, upon a conviction. If acquitted he would not need his exceptions; and if the case were opened upon exceptions by the government, the defendant could avail himself of the provision in the Constitution, which has been referred to, and which is the supreme law of the land.

Though a writ of error is regarded as a writ of right, and is so, still it will not lie for the Commonwealth, in a criminal case, to reverse an acquittal. *People v. Dill*, 1 Scammon, 257; *People v. Royal*, 1b. 557; *Commonwealth v. Harrison*, 2 Virg. Cases, 202; *State v. Reynolds*, 4 Hayw. 110, in the Court of Appeals in Tennessee; *United States v. More*, 3 Cranch, 174; *People v. Corning*, in the Court of Appeals in New York, 2 Coms. 9; *Commonwealth v. Cummings*, 3 Cush. 212; [1 Leading Criminal Cases, 425, and note.] The reasons, which have led to a denial of a writ of error in behalf of the Commonwealth, upon an acquittal, are the same, that would prevent the granting a new trial.

The judiciary of this State is a coördinate branch of the government, and intrusted with the administration of the law, and the whole law, both civil and criminal; and shall it be said, that, under our Constitution, the duties of a jury are in certain cases judicial, and that a jury of twelve men, who are selected without any regard to their knowledge of the law, and, indeed, upon the supposition that they are not and cannot be acquainted with its principles, become, when impannelled to try a criminal case, a coördinate branch of the government? Yet if they are the paramount judges of the law, this must follow, and all the different juries, who may be brought together throughout the State, for the time being, become a parcel of one of the coördinate branches of the government. Can a doctrine, which leads to such consequences, prevail in the United States? And

should it?—especially in this State, where our judges are elected annually by the immediate representatives of the people, also elected annually? And can such a doctrine be wholesome, and is it necessary for the individual security of the citizen? Is not its legitimate tendency only to enable the accused to obtain an acquittal against law, through the caprice of a jury, or through their ignorance upon a subject, upon which they are not supposed to have, and are not bound to have information? Though it may be true, that a jury would ordinarily follow the advice of the judge, and treat it, practically, as binding as a direction would be upon them, yet the danger would be in exciting trials, and where the law, which the government were attempting to enforce, was deemed unpopular. A jealousy of leaving the law to the court, in criminal trials, as in other cases, is, in the present state of things, the merest declamation. Our judges are dependent upon the people, and the very tendency of an elective judiciary is towards the popularity of the day.

One of the leading arguments of Lord Erskine, to establish the point, that juries are the judges of the law in a criminal case, was to attempt to show, that by the ancient common law the jury not only had the right, but that they were bound to exercise it, in deciding the law, when it came before them upon the general issue, in a civil case,—and from that infer, that they must have had the right upon a criminal trial. See his argument before the King's Bench, in the case of the Dean of St. Asaph, 1 Ersk. Sp. 165. The statute of Westm. 2, c. 30, passed as early as 1285, is made the basis of the argument of those, who claim, that juries were originally judges of the law in civil cases. Lord Erskine took the position, that from the words of the statute the right of the jury to decide the law, upon the general issue, was vested in them by the Constitution; but he wholly failed to satisfy the court, that this was ever the law. The statute enacts, that "the justices assigned to take assizes shall not compel the jurors to say precisely, whether it be disseisin, or not, so that they do show the truth of the fact, and require the aid of the justices; but if they of their own accord are willing to say, that it is disseisin, or not, their verdict shall be admitted, at their own peril." This statute was doubtless passed to secure to juries the right, in case of assize, where a special issue was joined on some collateral matter, to return a special verdict, referring the law to the court, the same as if the issue were general.

Coke, in his Commentaries upon Littleton, sec. 366, speaking of an assize, says, that a special verdict may be given in any action, and upon any issue, be the issue general, or special, although there be some contrary opinions in the books; yet, he says, the law is now

settled on this point. He cites several cases from the Year Books, and also the statute Westm. 2, chap. 30. This statute is generally considered as declaratory of the common law, and in affirmance of it. In section 367, Littleton remarks, "And as it is said of a verdict at large, (a special verdict,) in an assize, &c.," so it is of a writ of entry, founded upon a disseisin, and in all other actions, where the justices will take the verdict at large; the manner of the whole entry is put in issue." And in section 368, Littleton adds, "the jury may, in such case, where they may give their verdict at large, return a verdict generally, if they will," &c. Coke, adds, "although the jury may take upon themselves the knowledge of the law, and return a general verdict, yet it is dangerous for them so to do, as they run into the danger of attain, if they mistake the law." But if they were constitutionally the judges of the law in civil cases, why should they be in danger of an attain? The implication of the concluding clause of the statute is a strong argument, that the jury were not to decide the law. If, upon their own accord, "the jury are willing to say, that it is disseisin, or not, their verdict shall be admitted, at their own peril." If the statute gave the right to the jury, or affirmed a right of the common law, to decide the law in such a case, what peril could they incur by exercising the right? The statute implies that if the jury will undertake to decide the law, they will incur such penalty, as they may be subjected to, for exceeding their jurisdiction.

I think Glanville, lib. 13, c. 20, 21, is a strong authority, to show, that the jury have no right to decide the law upon the general issue involving both law and fact, notwithstanding it has sometimes been attempted to explain it away. Glanville says, that the assize could not decide upon the law connected with disseisin; and that, if the demandant object to put himself upon the grand assize, he must show some cause why the assize should not proceed; and, if the objection be admitted, the assize itself shall thereby cease, so that the matter shall be verbally pleaded and determined in court, because it is then a question of law, &c. If a sufficient reason be shown, the assize shall not proceed; and Glanville says, that an assize cannot decide upon the law connected with disseisin; consequently the assize shall for such cause cease. In *Townshend's case*, Plowd. 111, 114, the jury undertook to decide a question of law as to a remitter, and the court set aside their finding, as being against law. Though in this case the jury found the facts at large, yet if, in such case, they insist upon finding the law also, why may they not do it, if they are judges of the law? Why should the court set aside their conclusion? The true reason, as I think, is, that jurors are to try the facts,

and the judges to decide the law arising from them, for *ex facto jus oritur*, and not because they find the facts at large, though this may enable the court to decide the law of the case.

In pleading, matter of law can never be traversed. If it could, it is said, "it would be to make twelve illiterate men try a matter of law, of which they have no knowledge." And it is added, "at the beginning of our law it was ordained, that matters of fact should be tried by twelve men of the county, where the matter arises, and matters of law by twelve judges of the law; and that it was not the office of the jury to try matters of law, but only matters of fact." *Willion v. Berkley*, Plowd. 223, 231; also *Grendon v. Bishop of Lincoln*, Plowd. 493, 496. Buller, J., in his charge to the jury in the case of the Dean of St. Asaph, emphatically denies, that in civil cases the jurors were ever judges of the law in England; and I am not aware, that it has been ever claimed in this State, that in civil cases the jury were the judges of the law; though doubtless at an early day cases were submitted to a jury, without much separation of law and fact by the court. The argument, then, that the jury being judges of the law in civil cases, and from that inferring, that, upon a principle of equality, they must have the same right in a criminal case, must, especially in this State, fall to the ground. Though the fact, that a verdict of acquittal is final, makes an important distinction between criminal and civil cases, yet it is illogical to infer from this, that the jury are the judges of the law in criminal cases. A reason for the distinction is to be found in the principle, that no man can be put in jeopardy twice for the same offence.

Blackstone, 4th vol., 361, has been relied upon to sustain the opinion of the court. He says, "the jury may return a general or special verdict,—that is, where they doubt the matter of the law, they may leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside, at the suit of the king." This does not look as if Judge Blackstone supposed the jury constitutionally the judges of the law in criminal cases upon a plea of not guilty; though he evidently, when he speaks of the unquestionable right of the jury, confounds it with power; and it is, I think, confounding the power with the right, that has occasioned so much difficulty on this question. I am ready to concede, that, if the constitution and the laws of England make jurors the ultimate judges of the law in criminal cases, then a power to decide the law may be equivalent to a right; but this is taking for granted the very thing in

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dispute. If they have the power to acquit against the charge of the court, and such acquittal is final only because the accused cannot be put twice in jeopardy for the same offence; then the power of the jury to decide the law against the charge of the court may, as was remarked by Judge Story in the case in 2 Sumn., be said to be a physical power, and is not equivalent to right.

It is a fundamental maxim of the law, that, "*ad questionem facti non respondent iudices, ad questionem legis non respondent juratores.*" All fundamental maxims are so plain and intuitive as to be understood by all; and the usual course, when the object is to go astray from them, is first to avow them, and then attempt to pervert them. To get rid of the force of this maxim, it has been claimed, that it is to be confined to questions arising on the record. I am not aware, that it has been seriously claimed, that the court ever answer to matters of fact; and if the jury are the only judges of the fact, is it not equally within the spirit of the maxim, that the court are the only judges of the law. The maxim is general in its terms; and to confine the first part of it to questions of law, where the law and fact can be separated on the record, looks to me like a perversion of the language of the maxim. Certainly it is not so confined in civil cases. The fact, that the court have a common-law power to grant a new trial on the ground that they may apprehend the jury have mistaken the fact, is no violation of the language of the maxim. The court do not settle any fact, but simply open the case, that the facts may be passed upon by another jury.

The opinion of Vaughan, Ch. J., in *Bushell's case*, Vaughan, 149, 150, has been relied upon, as an authority for the limitation of this maxim,—but he says, "literally taken, it is true; for if it be demanded, what is the fact? the judge cannot answer; if it be asked, what is the law in the case? the jury cannot answer." It is true, Vaughan says, upon all general issues the jury *resolve* both law and fact *complicately*, and not the fact by itself. But I apprehend his meaning is, that in such case they may resolve the law as arising out of the facts found by them under the direction of the court. The judge cannot, he says, tell the jury, that, upon such evidence, the law is for the plaintiff, or for the defendant; for this would be to resolve both law and fact; but he says, p. 144, if the judge shall, before the jury give in their verdict, ask them how they find such a particular thing propounded to them by him, and they answer they find the fact so and so, and the judge shall then tell them, the law is then for the plaintiff, and you are accordingly to find for him, yet if they find for the defendant, this may be thought to be a finding in matter of law against the direction of the court, and so *vice versa*. But Chief Justice Vaughan recommends the giving the instructions

to the jury hypothetically, and not positively, — “that is, if the jury find the fact thus, then you find for the plaintiff; but if you find the fact thus, then it is for the defendant.” It seems, then, that the mode of separating the law from the fact on a jury trial by means of a hypothetical charge, was known at least as early as the 22 Charles II.; and the distinction of law and fact, in such case, may well be maintained by the integrity and intelligence of the jury.

Though it be granted, that a jury are exempt, in a criminal case, from all questions as to the propriety of their verdict, yet it does not follow from this, that they are the legitimate judges of the law. The proposition, that the power conclusively proves the right, if there is no legal accountability, proves quite too much. If it were true, the jury might rightfully acquit the defendant in all cases, without regard to the law, or the evidence; for no one can question their power to do so; and their exemption from all accountability for so doing, especially in this State, is equally clear. The power of the jury to acquit, against the charge of the court, arises out of the fact, that there exists no power or right to put the accused again on trial for the same offence; and consequently the power does not prove the right a legal one, though the finding of the jury be final.

There are several instances, where jurors, acquitting notorious offenders against clear and manifest evidence, and contrary to the direction of the court, have been punished in the Star Chamber, and have, also, in the King's Bench, and in courts of *oyer and terminer* and gaol delivery, been fined and imprisoned; and though Lord Hale, 2 Hale's P. C. 313, says, the long use of fining jurors in the King's Bench, in criminal cases, may give possibly a jurisdiction to fine in these cases, yet that it cannot be extended to inferior jurisdictions; but I apprehend, it is settled law, that no one is liable to a prosecution for any verdict he may give in a criminal matter; and the reason would seem to be, that the safety of the innocent and the punishment of the guilty are so dependent upon an upright and fair course of proceeding by a jury, that it is of the utmost consequence, that they should be as little biased as possible, for any cause whatever; and therefore, lest they should be influenced by the fear of being harassed by a vexatious suit for acting according to their own consciences, the law will not leave any possibility for a prosecution of this kind. 1 Hawk. P. C. chap. 72, sec. 5; *Croenvell v. Burwell*, Ld. Raym. 469. The fining and imprisoning of jurors has been frequently declared, in Parliament, an illegal and arbitrary innovation; and of dangerous tendency to the government, and the lives and liberties of the subject, — but not because the jury are of right the judges of the law in criminal cases. The true reason is the one previously assigned. 2 Keble, 180; *Bushell's case*, Vaugh. 135; 6

Har. St. Tr. 989. I readily admit, that much may be and has been said on the other side of the question, both in England and in this country; but I claim that the ground taken, will, on mature consideration, be found fallacious. Lord Erskine, who may be said to have exhausted the subject in his celebrated argument in the case of the Dean of St. Asaph, failed to convince the King's Bench, that the jury were the judges of the law in criminal cases; and the libel act of George II. did not, as I think, make the jurors the judges of the law, even in libel prosecutions,—and much less does it recognize the doctrine, that they were in other criminal cases.

It may be said of the case of the *State v. Wilkinson*, 2 Vt. 480, that the question was only incidentally before the Supreme Court, and it was not involved in the decision then made. It is true, the chief justice, for whom I entertain the most profound respect, does say, "there is no doubt, that, in criminal cases, the jury are the judges of the law as well as the fact." But it is now conceded, in this case, that they are judges of the law only for an acquittal; and I apprehend that Chief Justice Prentiss, upon mature examination, would as readily repudiate this whole doctrine, that jurors decide the law in criminal cases, as has been done by the Massachusetts court, when brought to a full consideration of the question. The case of *State v. Snow*, 6 Shep. 436, was evidently decided with very little personal examination of the subject on the part of the court; and the cases to be found in Wheeler's Criminal Cases can hardly be regarded as of any authority, even in the State of New York. The case of *State v. Allen*, 1 M'Cord's (South Carolina) Rep. 525, has been sometimes referred to on this question, but that case simply decides, that in that State the intention with which a publication is made, as well as the fact of publication and the truth of the innuendo, are involved in the general issue; and the whole case, law and fact, is revolved by a general verdict. This simply puts libel cases on the same ground as other criminal trials. The law is not put in issue to the jury, but it is resolved, by means of a general verdict under the issue; and if it should be asked, how? my answer is, under the direction of the court.

The discussions that have, at different times, taken place in libel prosecutions, are calculated to mislead on the question now before us, without a careful attention to the points in controversy. It was always conceded, that the fact of publication and the meaning were purely matter of fact, and exclusively for the jury; but when we come to the question of the tendency of the publication, and the intention of the publisher, a remarkable doubt has prevailed, whether they were purely questions of law, and to be abstracted from the jury on the trial, or whether they were mixed questions of law and

fact, and to be submitted to the jury, with proper directions from the court, like any other mixed questions of law and fact. The essence of a libel consists in its tendency to produce mischief; and it has been insisted, that the intrinsic illegality of the publication is not a mere question of law, since it consists in its tendency; nor is it claimed to be a mere question of fact, but it has been sometimes treated as an ambiguous question in its nature, depending, for its solution, upon a sound judgment and discretion, applied to the alleged libel, and the state and circumstances of society, and not purely on a profound knowledge of the law on the one hand, or the aid of evidence on the other.

Treating, then, the tendency, and the intention, as a mixed question of law and fact, the cases, where the intention and tendency have been submitted to the jury, under proper instructions, to pass upon, have no influence upon the question at bar; and *Thompson's case*, 3 St. Tr. 37, the case of *The Seven Bishops*, 4 St. Tr., and possibly *Tutchin's case*, may all be claimed to be of that description, and doubtless there may be others, where the same thing has been done. This is precisely what must be done in civil actions, where there is a mixed question of law and fact, and it is precisely what has been done in civil actions for a libel. See *Fairman v. Ives*, 5 B. & Ald. 642; *Baylis v. Lawrence*, 11 Ad. & E. 920.

Considering, then, as I do, that the doctrine, now established by this court, is opposed to the current of adjudged cases in England and in this country, and to constitutional principles, and in violation of the harmony of the legal system, and unfit in the nature of things, and in no way necessary for the preservation of the liberty of the citizen and the protection of innocence and the wholesome administration of criminal justice, and especially unnecessary in a government, where there is an elective judiciary, like the one in this State, the tendency of which is towards popular feeling, I have not been able to bring my mind to concur with my brethren. I should therefore hold, that the defendant should take nothing by his exceptions, whatever view we take of the case.

We have inserted the foregoing case here, not because the opinion of the majority of the court, as expressed by Judge Hall, is sustained by the current of authorities—for it is not—but because it presents the argument on that side of the question in the most full and forcible manner of any case known to us, if we except, perhaps, the opinion of Judge Kent in *The People v. Crosswell*, 3 Johnson's Cas. 337. But as a deliberate decision of a

court, it is the only elaborately reasoned case, in which it was the actual decision of the court that, at common-law, it is the legal right of the jury, in all criminal cases to disregard the instruction of the court in matters of law, and to decide contrary to such instructions, without violating the law of the land, their own duty, or the oath they have taken. We say the only case which by any force of argument, sustains that position; for the case of *The*

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State v. Snow, 6 Shepley, 436, is certainly very barren of argument, as well as wanting in judicial precedent, and the same may be said of *The State v. Armstrong*, 4 Blackford, 247, and *Warren v. The State*, Id. 150.

It is to be understood also that this remark is confined to cases asserting such right as a common-law right; for the cases of *Holder v. The State*, 5 Georgia, 441, and *Patterson v. The State*, 2 English, 59, proceed entirely upon statutory enactments. The remark is also to be applied to this case as asserting the right, in all criminal cases; for the able opinion of Judge Kent in 3 Johnson's Cases, and the unsurpassed argument of Erskine in *The Dean of St. Asaph's case*, were put forth in favor of the right only in libel cases. But the case in Vermont asserts the broad doctrine that in every criminal case the right exists in the jury to decide the law for themselves. If, therefore, the only question made by the defendant in a criminal case were the constitutionality of the law under which he was prosecuted, we see not why, under the decision of *The State v. Croteau*, the jury are not the only judges thereof.

How far the weight of the case, as a decision, is impaired by the elaborate dissenting opinion, the reader can form his own conclusion. And how far the case is consistent with another decision of the same court in the same volume, *The State v. Woodward*, 23 Vermont, 92, an actual examination of the latter case will itself indicate. But it is clear that it has not received the sanction and approval of other courts. It was much pressed upon the Supreme Court of North Carolina in the recent case of *The State v. Peace*, 2 Jones, 251, (1854.) That was a case of murder, and the presiding judge declined to instruct the jury, at the prisoner's request, that the jury were judges of the law as well as of the facts. Upon a bill of exceptions the question was fully argued, and the Supreme Court said: "We had considered this question at rest, and that there had been an acquiescence and concurrence of opinion as to the correctness of this doctrine among the pro-

fession, 'time whereof the memory of man runneth not to the contrary.' But two instances, before the present, have occurred in this State, where a different doctrine was contended for, within the recollection of either member of this court. One, before the act of 1844, in the times of the excitement about nullification, upon an indictment of the editors of a newspaper for a libel. The other, since that time, under very peculiar circumstances. The counsel for the prisoner called our attention to a very elaborate opinion in *The State v. Croteau*, 23 Vermont, 14. We listened attentively to his learned and ingenious argument, but it failed to remove from our minds a deep conviction that such cannot be the law. The case is met by those of *The United States v. Battiste*, 2 Sumner, 240, and *The Commonwealth v. Porter*, 10 Met. 263, and although these last cases are opposed with much labor and ingenuity, are by no means satisfactorily answered."

The Federal Courts of the United States, so far as they have expressed any opinion upon this interesting question, deny the right of the jury to judge of the law. In *The United States v. Morris*, 1 Curtis, C. C. 53, (1851,) after a careful examination of the reasons and authorities on this question, Curtis, J., said:—"Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made, in England, near the close of the last century, when the law of libel was under discussion in the courts and in parliament, it cannot be doubted that, if any decision, having the least weight, could have been produced in support of the general proposition, that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench, in *Rex v. The Dean of St. Asaph*, 3 T. R. 428, and the answers of the twelve judges to the questions propounded by the House of Lords, assume, as a necessary postulate, what Lord Mansfield so clearly declares in terms, that, by the law of England, juries cannot rightfully decide a question of law. Passing over what was asserted

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by ardent partisans and eloquent counsel, it will be found that the great contest concerning what is known in history as Mr. Fox's Libel Bill, was carried on upon quite a different ground by its leading friends; a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law; and asserts that it is so mixed with the fact that, under the general issue, it is for the jury to find it as a fact.¹ Such I understand to be the effect of that famous declaratory law. (St. 32 Geo. III. c. 60.) The defendant's counsel argued that this law had declared that, on trials for libel, the jury should be allowed to pass on law and fact, *as in other criminal cases*. But this is erroneous. Language somewhat like this occurs in the statute, but in quite a different connection, and, as I think, with just the opposite meaning. 'The court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his *opinion and directions* to the jury, on the matter in issue between the king and the defendant, *in like manner as in other criminal cases*.' This seems to me to carry the clearest implication that, in this and all other criminal cases, the jury may be *directed* by the judge; and that, while the object of the statute was to declare that there was other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge, to decide all matters of law. That this is the received opinion in England, and that the general rule, declared in *Rex v. Dean of St. Asaph*, that juries cannot rightfully decide the law in criminal cases, is still the law in England, may be seen by reference to the opinions of Parke, B., in *Parmiter v. Copeland*, 6 M. & W. 165; and of Best, C. J., in *Levi v. Milne*, 4 Bing. R. 195. I conclude then, that when the Constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as civil

cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the Constitution when it adopts a trial by jury." And again:—"It is said that, in rendering a general verdict of guilty, or not guilty, the jury have the power to pass, and do in fact pass, on every thing which enters into the crime. This is true. But it is just as true of a general verdict in trover or trespass; and yet I suppose the right of the jury to decide the law in those cases, is not claimed. The jury have the power to go contrary to the law as decided by the court; but that the power is not the right, is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do. It is supposed that the old common-law form of the oath of jurors, in criminal cases, indicates that they are not bound to take the law from the court. It does not so strike my mind. They are sworn to decide according to the evidence. This must mean that they are to decide the facts according to the evidence. But if they may also decide the law, they are wholly unsworn as to that, and act under no obligation of an oath at all in making such decision. A passage in Littleton's Tenures, (lib. 3, s. 368,) and the Statute of Westminster, 13 Edw. I., and the Commentary of Coke thereon, relating to an assize, have been referred to; but the assize was not a jury; not a criminal case, but an action between party and party, and that if the statute intended to confer on the assize the right, as well as the power, to decide the law, it was a strange provision which subjected them to punishment if they decided the law wrong; for it would seem that what was right or what was wrong must be determined by the tribunal having the rightful powers to determine it, which is supposed to be the assize itself."

The question was very carefully examined in the Circuit Court of the United

¹ Annual Register, Vol. 34, p. 170; 29 Par. His. Debates in the Lords, and particularly Lord Camden's Speeches.

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States for the District of Columbia, in *Stettinius v. The United States*, 5 Cranch, C. C. 573, (1839), in which it was held that neither at common law, nor under the Constitution of the United States, had the jury in a criminal case any right to judge of the law, but that they were bound to follow the law as laid down by the court. The learned reader is referred to this case as an instructive one on the subject of this note. In Virginia the same rule prevails. *Davenport v. The Commonwealth*, 1 Leigh, 588, (1829); *The Commonwealth v. Garth*, 3 Leigh, 761, (1831); *Blunt v. The Commonwealth*, 4 Leigh, 689, (1834); *Gwatkin v. The Commonwealth*, 9 Leigh, 678, (1839); *Howell v. The Commonwealth*, 5 Grattan, 664. Likewise in Tennessee. *Nelson v. The State*, 2 Swan, 482, (1852.) And many years before it had been held, in that State, no error for the judge to instruct the jury that "the court was to be the judge of the law, and the jury exclusively judges of the fact, and it was the duty of the jury to receive the law as laid down and expounded by the court, and the jury were not the exclusive judges of the law and the facts, except as the law was expounded by the court." *McGowan v. The State*, 9 Yerger, 184, (1836.)

It is sometimes urged that because counsel have a right to argue the law to the jury in a criminal case, therefore the jury have the right to decide it; but that argument is fully answered by the cases of *The Commonwealth v. Porter*, 10 Metcalf; *The Commonwealth v. Abbott*, 13 Metcalf; *Stettinius v. The United States*, 5 Cranch, C. C. 573; *The State v. Peace*, 1 Jones, 251. In North Carolina, the right to argue the law to the jury is secured by statute, "in all jury trials," but the court held in the last case that such provision gave no right, even by inference, to the jury to decide the law.

The other principal argument advanced to support the right, is that the jury have the power to decide against the instructions of the court, and why the power, unless the right? Thus, Hall, J., in the principal case, says, with emphasis: "In my opinion, such power is equivalent to a right." But, in answer to this argument, it may be said the jury have the power to decide for the prisoner against all the facts; that is to say, there is no redress if they do; but does that give them the right? Is not their power to decide against the instructions of the court, like their power to decide against all the evidence, simply the result of the common-law principle, that after a verdict of acquittal in a criminal case, the government has no right of appeal, new trial, or exceptions; and that whether the decision of the cause in favor of the prisoner be from error in law, or mistake in fact, the verdict can never be set aside? But whatever may be the weight of reasoning on this important and highly interesting question, there is no doubt but that the authorities are nearly uniform against the doctrine of *The State v. Croteau*. For, to say nothing of the English judges, we find the decision of several of the United States Courts, and the Supreme Courts of Massachusetts, New Hampshire, Rhode Island, New York, Pennsylvania, Virginia, Ohio, Indiana, North Carolina, Tennessee, Alabama, Missouri, Kentucky, and Texas, denying any such right in a jury, leaving only the courts of Maine and Vermont asserting it as a common-law right. The remark of the defendant's counsel in *The State v. Croteau*, therefore, that "the charge of the court contravenes all authority upon the subject, both English and American, (with two exceptions,) from the Year Books to 1835," seems to be the exact reverse of the truth.

E. H. B.

Felonies — Defendant must be present at the Trial.

SPERRY v. THE COMMONWEALTH.¹

December Term, 1838.

Felonies — Defendant must be present at the Trial.

In a prosecution for felony, the accused must be arraigned and plead *in person*, and in all the subsequent proceedings he must appear *in person*, not by attorney; and such appearance in person must be shown by the record.

WRIT of error to a judgment of the Circuit Superior Court of Law and Chancery for Cabell County, rendered against the plaintiff in error, at April Term, 1838, upon an indictment for stealing an iron gray mare of the value of sixty dollars, the property of Lewis Bench. The accused being found guilty by the jury, was sentenced to imprisonment for five years in the penitentiary.

The indictment was found at September Term, 1837; and, at that term, the prisoner was led to the bar in custody, was arraigned, and pleaded not guilty. Whereupon, on his motion, the cause was continued till the next term.

The record then states, that at a circuit court continued and held for Cabell County, on Friday, the 27th of April, 1838, "came as well the attorney for the commonwealth, as the prisoner *by his attorney*, and thereupon came a jury," &c., who, having heard the testimony and arguments of counsel, retired to consider of their verdict, and, not agreeing on that day, were adjourned until the next, when they again appeared in court and rendered their verdict; "whereupon the prisoner was remanded to jail."

When brought into court, on a subsequent day of the term, to receive his sentence, the prisoner moved the court to grant him a new trial, on the ground that the verdict was contrary to the evidence; which motion being overruled, he excepted, and set out in his bill of exceptions all the material facts and circumstances proved on the trial. But the cause was decided in this court without reference to the evidence.

In his petition to the General Court, the prisoner assigned for error the refusal of the Circuit Court to grant a new trial; insisting that the whole evidence only showed him to have been guilty of a fraud, and did not warrant a conviction of felony. For this "and other errors apparent on the face of the record," he prayed a writ of error, which was awarded.

¹ 9 Leigh, (Virginia,) 623.

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The cause was submitted by *P. R. Grattan*, for the plaintiff in error, and *The Attorney-General*, for the commonwealth, without argument.

LOMAX, J., delivered the opinion of the court. The first error relied upon, in the petition in this case, the refusal of the court below to grant a new trial, this court has deemed it unnecessary to consider, because it discovers in the record another error, which supersedes the necessity of considering the first.

The well-established practice in England and in this State is, that a prisoner, accused of felony, must be arraigned in person, and must plead in person; and, in all the subsequent proceedings, it is required that he shall appear in person. This practice is stated in 1 Chit. Crim. Law, 411, 414. It is there laid down, that the accused in capital felonies cannot be found guilty in his absence; that it is necessary he should personally attend; and that the fact of such attendance should appear on the record. The rules applicable in England, to trials for capital felonies, are believed, in the general, to be equally applicable in this State to all felonies punishable by confinement in the penitentiary. In looking into the English forms of entries, it will be found that the appearance of the accused is carefully stated upon the record to have been in his proper person. 4 Chit. Crim. Law, 268.

The principles on which this practice is founded are supposed to be too obvious to need explanation or illustration.

In this record, it is stated that, on the 29th of September, 1837, the accused was led to the bar in custody of the keeper of the jail, and thereupon was arraigned and pleaded; and, on his motion, the cause was continued till the first day of the next term, and thereupon he was remanded to jail. And afterwards, at a circuit court, &c., held on the 27th of April, 1838, "came as well the attorney for the commonwealth, as the prisoner *by his attorney*, and thereupon came a jury," &c. The jury not agreeing upon their verdict on that day, were adjourned over until the next day; and afterwards, on Saturday, the 28th April, 1838, the record proceeds to state, that "the *venire* impanelled upon the trial of this cause on yesterday again this day appeared in court, and retired to consider of their verdict, and after some time returned into court, and on their oath do say, 'We of the jury find the prisoner, Allen M. Sperry, guilty of the felony charged, and do ascertain the period of his confinement in the public jail and penitentiary house to be five years; and we further find that the mare stolen has been restored to the owner thereof.' Whereupon the prisoner was remanded to jail."

If it can be inferred, from the circumstance that the prisoner was remanded to jail, that he was personally present during the proceed-

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ings on the 28th of April, when the verdict of conviction was found, there is no such circumstance stated in the proceedings of the preceding day. The only statement, in regard to the appearance of the prisoner on that day is, that he appeared by his attorney; without any circumstance stated from which it can necessarily be inferred that he was personally present. An appearance by attorney cannot imply that the prisoner was personally present in court; and therefore the record is deficient in what the law regards as essential to be stated in such a case.

For this error, therefore, the court is of opinion that the judgment must be reversed, and a *venire facias de novo* awarded.

In *Rex v. Duke*, Holt, R. 399; 1 Salkeld, 400; 1 Lord Raymond, 267; Skinner, 684, (1697,) the defendant had been convicted of perjury; and upon the *capias* he was outlawed for it, and judgment was moved for in his absence, but Holt, C. J., said: "Judgment cannot be given against any man, in his absence, for a *corporal* punishment. He must be present when it is done. If a man be outlawed of felony, execution was never awarded against the felon till brought to the bar. There is no precedent of any such entry. For if we give judgment that he should be put in the pillory, it might be demanded *when*; and the answer would be, *when they catch him*. And there never was a writ to take a man and put him in the pillory. It is not like to a *capias pro fini*, which is, to bring him into court to pay the money. A defendant may submit to a fine, though absent, if he has a clerk in court that will undertake for the fine. And in *Rex v. Harris*, Holt, R. 399; Comberback, 447, (1697,) the same judge said: "Sir Samuel Astry tells me, there never was a writ to the sheriff to take up any man that was at large, and to put him in the pillory; therefore we can not give any such judgment, in the absence of the party, *which can not be executed*. I never knew a judgment for a corporal punishment, unless the party were present, except the case of one Mrs. Buckridge, which was irregular." See to the same effect, Lofft, 409.

The same general principles have been uniformly recognized in America. If the punishment inflicted is, or *may be*, corporal, the defendant must be present, or

the sentence is erroneous. *Rex v. Hanna*, 3 Burrow, 1787, (1765); *The People v. Winchell*, 7 Cowen, 525, (1827); *The People v. Clark*, 1 Parker, 361, (1852); *The State v. Hughes*, 2 Alabama, 102, (1841). And the record should distinctly and positively show that the defendant was present when sentence was pronounced, or the same will be reversed on writ of error. *Hamilton v. The Commonwealth*, 4 Harris, 129, (1851); *Dunn v. The Commonwealth*, 6 Barr, 384, (1847); *The State v. Matthews*, 20 Missouri, 55, (1854); *Scaggs v. The State*, 8 Smedes & Marshall, 722, (1847); *Safford v. The People*, 1 Parker, 474, (1854); *Kelly v. The State*, 3 Smedes & Marshall, 518, (1844.) And the following recital in the record,— "The court sentenced George Dunn, the defendant, to be taken to jail, &c., from whence *you* came," is not sufficient evidence of his personal presence at the passing of the sentence. *Dunn v. The Commonwealth*, 6 Barr, 384. So in *Scaggs v. The State*, *supra*, it was held the prisoner's presence could not be inferred from the recital that he asked a witness certain questions; as they may have been in writing. But a less strict construction was adopted in *The State v. Craton*, 6 Iredell, 164, (1845), where it was said to be sufficient if the presence of the defendant appeared by necessary or reasonable implication; and in that case the statement in the record that "the prisoner, John P. Croton, appearing at the bar, and pleads not guilty,— and it is ordered by the court that the prisoner be taken back to the prison," &c., was held sufficient evidence of his pres-

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ence, although the court say, "It would be much better to state it directly. It is greatly to be regretted that the clerks will not be guided by precedents in such matters." That it is sufficient if the fact of the prisoner's presence may be collected from the record by fair intendment, see also *West v. The State*, 2 New Jersey, R. 212, (1849,) which is certainly the more reasonable rule. In *Holmes v. The Commonwealth*, 1 Casey, 221, (1855,) it was said that it was only in capital felonies that it must affirmatively appear on the record that the prisoner was present when the verdict was returned; in other cases his presence would be presumed.

So necessary is the presence of the defendant in prosecutions for high crimes, that in *The King v. Speke*, 3 Salkeld, 358, (1689), judgment in a prosecution for high treason was reversed because the court did not ask the defendant, before pronouncing sentence, "What he had to say for himself, why judgment should not be given?" This is a necessary question, said the court, because he may have a pardon to plead, or may move in arrest of judgment. The like decision was made in *Rex v. Geary*, 2 Salkeld, 630; 1 Shower, 131, (1689,) although the defendant had pleaded guilty to the charge. In *West v. The State*, 2 New Jersey, R. 212, (1849,) it was thought not necessary to ask this question, except in capital cases; but in the later case of *Safford v. The People*, 1 Parker, 474, (1854,) it was considered essential in all cases of felony, and certainly the reason for the inquiry exists in the one case as much as in the other.

This necessity for the presence of the defendant in capital cases, exists through every stage of the trial. He must, of course, be present at the arraignment, and the record must positively show the fact. *Jacobs v. The Commonwealth*, 5 Sargent & Rawle, 315, (1819.) He has a right also to be present when the court state the evidence to the jury. *Wade v. The State*, 12 Georgia, 25, (1852.) In this case the jury were recalled into the court room; and part of the evidence was recapitulated to them in the prisoner's absence, which was held erroneous. And when the verdict is returned, the prisoner has a right

to be there. In *The King v. Ledgingham*, T. Raymond, 193; 2 Keble, 687; 1 Ventris, 97, (1670), it was said: "No privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner, when they give their verdict, and so the prisoner is to be there present at the same time." *The People v. Perkins*, 1 Wendell, 91, (1828); *The State v. France*, 1 Overton, 436, (1809); *Sargent v. The State*, 11 Ohio, 472, (1842); *Cole v. The State*, 5 English, 318, (1850); *Rose v. The State*, 20 Ohio, 31, (1851); *Harri-man v. The State*, 2 Greene, 271, (1849); *The State v. Hurlbut*, 1 Root, 90, (1784); for the reason, as generally given, that he then has a right to poll the jury; but it is doubtful whether a prisoner has an absolute right to poll the jury, even in capital cases. *Fellow's case*, 5 Greenleaf, 333, (1828); *The Commonwealth v. Roby*, 12 Pickering, 496, (1832.) And this right to be present has been said to be inherent and inalienable, and one that can not be waived by his counsel. *Prise v. The Commonwealth*, 6 Harris, 103, (1851,) a case of burglary. And in *Nomaque v. The People*, 1 Breese, 109, (1825,) a case of murder, the prisoner's counsel agreed that the jury might deliver their written verdict to the clerk of the court, after the adjournment, for the day, which they did, and the clerk handed it to the court, in the absence of the jury. This was held erroneous. "The prisoner," said the court, "in a capital case must be considered as standing on all his rights. He can not be considered as waiving any thing, nor could his counsel do it for him. Counsel possess neither the power nor the right." And see *The People v. McKay*, 18 Johnson, 218, (1820.) And Gibson, C. J., said: "It is undoubtedly error to try a person for felony in his absence, even with his consent. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive his presence? In a criminal case there is no warrant of attorney, actual or potential; for when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act. It is un-

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necessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable." *Sed quære*; for it is a personal right of the defendant, and one established solely for his benefit, and there seems to be no good reason why it may not therefore be waived by him. As, where the defendant is at large upon his own recognizance, and voluntarily absents himself from court when the verdict is returned, it would be difficult to consider the verdict erroneous on that account. It must be only where the prisoner is deprived of his right to be present by imprisonment, or some other improper means, that the verdict then returned ought not to be followed by judgment. See *Wilson v. The State*, 2 Ohio State Rep. 319, (1858); *Rose v. The State*, 20 Ohio, 31, (1851.) In *Sneed v. The State*, 5 Pike, 431, (1844,) however, it was held that it was erroneous to receive a verdict in case of a felony, in the absence of the defendant, although he was out on bail, and was voluntarily absent. See also *The State v. Hulbert*, 1 Root, 91, (1784.) *Clark v. The State*, 4 Humphreys, 254, (1843); *Andrews v. The State*, 2 Sneed, 550, (1855.)

It does not follow, however, that because a verdict is rendered in the absence of a defendant, he is entitled to be discharged; it is merely a mis-trial, and the verdict ought to be set aside, and the prisoner tried again. *The People v. Perkins*, 1 Wendell, 91, (1800); *The State v. Hughes*, 2 Alabama, 102, (1841); *The State v. Battle*, 7 Alabama, 259, (1845.) And, on the same principle, if the defendant be present when the verdict is given, but absent when sentence to a corporal punishment is pronounced, he is not therefore entitled to a new trial; the judgment should simply be reversed and the case remanded for a sentence according to law. *Cole v. The State*, 5 English, 318, (1850); *Kelly v. The State*, 3 Smedes & Marshall, 518. It is not, however, any ground of error that a prisoner's counsel is not in court when the verdict is delivered. *Sutcliffe v. The State*, 18 Ohio, 469, (1849.)

The presence of the defendant at any proceedings after sentence, as on the hearing of a writ of error, or on the de-

cision thereof, does not seem necessary. *The People v. Clark*, 1 Parker, 360, (1852.) And see *Jewell v. The Commonwealth*, 10 Harris, 94, (1823.) But in England it is held that on a motion for a new trial, all the defendants convicted must be present; *The King v. Askew*, 3 Maule & Selwyn, 9, (1814); *The King v. Teal*, 11 East, 307, (1809); certainly if the punishment is corporal; *Regina v. Parkenson*, 6 Eng. Law & Eq. R. 352, (1851); *Rex v. Hollingbery*, 4 Barnwell & Cresswell, 329, (1825.)

Our selected case, and most of the authorities cited in this note, speak of the presence of the defendant at the trial in capital cases, or other cases of felony; another instance of the importance of carefully discriminating between felonies and misdemeanors, and of the need of an accurate classification and enumeration of the several offences which fall under each head at common-law; a classification not to be found in any treatise on criminal law which has ever fallen within our observation.

But, while the presence of the accused is necessary in capital felonies; on the other hand, in prosecutions for misdemeanors, or crimes not punishable by imprisonment, the rule has always been different, both in England and in this country. In such cases the trial may proceed, the verdict be returned, and the sentence pronounced in the absence of the accused; certainly if his attorney is present. *Son v. The People*, 12 Wendell, 344, (1834); *Canada v. The Commonwealth*, 9 Dana, 304, (1840); *Savoyer v. Joiner*, 16 Vermont, 497, (1844); *Tracy, ex parte*, 25 Vermont, 93, (1853); *Holiday v. The People*, 4 Gilman, 111, (1847); *Steele v. The Commonwealth*, 3 Dana, 84, (1835.)

Still it is undoubtedly discretionary with the court, whether they will allow a defendant to be absent during the trial of even a misdemeanor; and in offences of a gross or public nature, a person convicted should appear in person, for the sake of example, and prevention of the like offences being committed by other persons, as the notoriety of their being called up to answer criminally for such

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offences would very much conduce to deter others from venturing to commit the like. See *Rex v. Hann and Price*, 3 Burrow, 1787, (1765), where the court refused to allow the defendants, convicted of official misbehavior as licensing officers, to be absent at the sentence, on the undertaking of their clerk in court to answer for their fine. This subject of trying a person in his absence was carefully considered in the United States Circuit Court for the first circuit, in the *The United States v. Mayo*, 1 Curtis, C. C. 433, (1853), an indictment for a misdemeanor. Curtis, J., then stated the following points, on a motion to allow the defendant to plead to the indictment by his attorney. 1. To save his recognizance, even in case of a misdemeanor, the defendant must appear personally. 2. He is liable to be called on his recognizance at any time, either on motion of the district attorney, or by the order of the court. 3. It is in the discretion of the court to allow one indicted for a misdemeanor to plead and defend, in his absence, by attorney. This discretion

will be regulated by the following circumstances. .

1. That it is not an offence for which imprisonment *must* be inflicted.

2. The court must be satisfied, that the nature of the case, and its circumstances are such, that imprisonment *will not* be inflicted.

3. The district attorney must consent, or it must appear to the court that he unreasonably and improperly withheld his consent.

4. Sufficient cause must be shown, on affidavit, to account for the absence of the defendant.

5. A special power of attorney to appear and plead and defend in his absence, must be executed by the defendant, and filed in court by the attorney.

The wisdom and propriety of the rules above laid down are so obvious as to commend themselves to every one desirous of seeing the criminal law so administered as to secure popular respect.

R. H. B.

 THE KING *v.* WESTBEER.¹

Trinity Term, 1740.

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The information of a dead accomplice may read in evidence against a prisoner.

A commission to settle the boundaries of a manor is an instrument concerning the realty, and not the subject of larceny.

Judgment for a trespass in taking away an instrument which concerns the realty cannot be given on an indictment for stealing it.

At the Old Bailey January session, 1739, Thomas Westbeer was indicted before Lord Chief Baron COMYNS, and Mr. Justice CHAPPLE, for stealing a parchment writing, purporting to be a commission, dated in the reign of Queen Anne, empowering the commissioners therein named (pursuant to an order which had been previously

¹ 1 Leach, 12, Case vi. ; 2 Strange, 1137.

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made in chancery, in a cause between Lord Chesterfield and John Cantrell and others) to enter and ascertain the boundaries of the manors of Bradbury and Hartsherne, and to certify how high the water of Furnace Pool ought to be kept, &c. And also one other parchment writing, purporting to be a return made to the said commission. The property was laid to be the goods of our sovereign lord the king, and of the value of four shillings.

One Curteis Lulham, an accomplice, had made a full confession in writing, and given information upon oath against the prisoner, before Lord Chief Justice Lee, pursuant to the statutes of Philip & Mary, 1 & 2 P. & M. c. 13; 2 & 3 P. & M. c. 10; but before Westbeer could be brought to his trial, Lulham, the accomplice, died in prison. The attorney-general, Dudley Ryder, Esq., after proving the fact of Lulham's death, insisted upon reading his depositions, made before the chief justice, as evidence against the prisoner.

Mr. Serjeant *Hayward* and Mr. *Barnardiston* opposed their being read; and contended, that as the act of God, which the law says shall not work an injury to any man, had, by Lulham's death, deprived the crown of the opportunity of producing him *vivâ voce*, the admitting his deposition to be read in evidence would injure the prisoner, inasmuch as he would lose the benefit which might otherwise have arisen from a cross-examination. The attorney and solicitor-general replied, and the point was very much debated. But the court overruled the objection, and admitted Lulham's information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony.

The court, upon hearing the evidence, expressed a doubt, whether the offence amounted to felony. The jury therefore found a special verdict, "That the prisoner was guilty of privately taking away a parchment writing, value one penny, from the records in the Court of Chancery, purporting to be a commission under the broad seal; and another parchment writing annexed thereto, value one penny, purporting to be the return to the said commission, with intent to steal the same; that they were the goods of the king; and that the cause of which they were the records, was finally determined in the year 1717."

In Trinity Term, 1740, this special verdict and the indictment were removed by *certiorari* into the Court of King's Bench. Three objections were raised on the part of the prisoner; First, That it was a false conclusion of the jury, that these parchments were the goods of the king. Secondly, That being records, the indictment ought to have been on 8 Hen. VI. c. 12, s. 3, which introduces an entire new law. Thirdly, That they concerned the realty, and could not become the subjects of larceny, from their constructive adherence to, and connection with, the freehold.

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This case was twice argued at the bar; but the two first points were very slightly spoken to, and not much relied upon. On the third point it was argued on the part of the crown, that these parchment writings were neither chattels real nor *choses in action*; and the only question would be, whether they could be construed to be charters concerning the inheritance? The reason given by Mr. Serjeant Hawkins, 1 Hawk. P. C. 142, why a felony cannot be committed of these things is, "Because being of no use but to the owner, they are not supposed to be so much in danger of being stolen, and therefore need not be provided for in so strict a manner as those things which are of a known price, and everybody's money." But the present parchments are not of that description, for the jury have affixed such a value to them as will make the offence petty larceny. For charters which concern the realty, the heir may bring his action; but for these records, no such action will lie. The case in the Year Book, 10 Edw. VI. pl. 14, from which this distinction is drawn, says, that felony cannot be committed of charters which concern the realty, because they cannot be valued; but a value has been here affixed, and it is well known that for certain purposes old parchments will sell for a considerable price. It is clear, that the relation to the realty does not alone create the exemption; for there is no doubt but it would be felony to steal an heirloom, and yet that savors of the realty.

It was admitted by the counsel for the prisoner, that the parchment writings were neither chattels real, nor *choses in action*; but it was contended, that as they related to the boundaries of manors, and the right of water, they were charters which concern the realty; for what can affect the inheritance more than the right of water, and the boundaries of a manor? It is true, perhaps, that the heir could not maintain an action to recover them, because they are of that nature which are called *nullius in bonis*, and every man has an equal right to resort to them. They are in the possession of the crown, as being public records; but it does not follow from thence that they are the property of the king.

The court gave no opinion, whether these were properly laid to be the goods of the king, nor whether the law as to this case was altered by 8 Hen. VI. c. 12; but they were unanimously of opinion that these parchment writings concerned the realty, and that therefore the prisoner was not guilty of the felony charged in the indictment.

But another question arose, Whether the prisoner should be discharged, or receive judgment as for a trespass? He was accordingly remanded, in order that this question might be seriously considered. At another day Mr. Solicitor and Mr. Attorney-General attempted to support the affirmative, and cited the Year-Book, 2 Hen. VII. 10 & 22; Cro. Car. 332; Kelynge, 29; Cro. Jac. 497; 1 And. 351;

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Dalt. 321. But it was answered, that the prisoner would in this case lose many advantages, to which if he were indicted for the misdemeanor he would by law be entitled. He might have full counsel, a copy of his indictment, and a special jury. Beside, the verdict doth not find the taking to have been *vi et armis*; and if the word *felonice* be taken away, no trespass remains.

The court observed on the several cases which had been cited on the part of the crown; and showed that they were repugnant to the rules of law and principles of justice. The prisoner was accordingly discharged.

Westbeer's case has always been cited as the leading case in England, settling the law in that country, that one indicted for a felony, or charged with doing any act "feloniously," can not, on the same indictment, be convicted and sentenced for a misdemeanor, even if the facts proved at the trial clearly amounted to such offence. It was therefore the practice in England, when neither the felony charged, nor any other expressly or impliedly included in it, was made out by the evidence, to direct an entire acquittal on that indictment, and to advise that a new indictment be preferred for the misdemeanor alone. This course, Alderson, B., in *Regina v. Bird*, 2 Eng. Law & Eq. R. 473, calls a "practice of centuries." This rule did not prevent a person indicted for one felony from being convicted of another felony legally included in the felony charged, if the evidence warranted it; for it was common to convict of manslaughter on an indictment for murder; so on a charge of robbery, to convict of larceny, if the violence was not sufficiently proved. For it never was the rule of the common law that the proof must sustain every averment of the indictment, in order to justify a conviction of the party; but if the prosecutor proved so much of the charge as amounted to an offence punishable by law, the defendant might be convicted of such offence. Thus, if indicted for conspiring to falsely indict another to extort money, the defendant might be convicted of conspiring to indict for the purpose of extorting money, though not *falsely*, as alleged; for such a conspiracy is a misdemeanor, whether the subject mat-

ter of the indictment be true or false. *Rez v. Hollingberry*, 4 Barnwall & Cresswell, 329, (1825.) So on an indictment for libel, with intent to defame the persons libelled, and also with intent to bring the administration of justice into contempt, it would be quite sufficient to prove a publication with either of those intentions. *Rez v. Evans*, 3 Starkie, R. 35, (1821.) So, on a charge of an assault with intent to abuse and carnally know, the defendant might, at common law, be convicted of an assault with intent to abuse simply. *Rez v. Dawson*, 3 Starkie, R. 62. And see other instances in the note to *Rez v. Hill*, ante, 136. But the rule was clear that on a charge of felony, one could not be convicted of a misdemeanor.

Undoubtedly the most important, if not the only reason why this could not be done was, that at that early day, persons indicted for a misdemeanor had certain advantages or privileges, and among others, that of making full defence by counsel, which those charged with a felony did not then enjoy. It was, therefore, reasonably enough, thought unjust to a prisoner to permit a prosecutor, by accusing him of a felony, when he had committed only a misdemeanor, to deprive him of these rights, which he would enjoy if indicted only for the crime of which he was actually guilty. For the same reason, it was the ancient rule in England that a count for a felony could not be joined in the same indictment with a count for a misdemeanor.

Although the original reason for this rule ceased in England by the passage of the Prisoner's Counsel Act, in 1836, (6 & 7 Will. IV. c. 114,) allowing all

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persons tried for felony to make full defence by counsel, yet the practice continued as before laid down in *Westbeer's case* until Lord Denman's Act, in 1837, (St. 1 Vict. c. 85, § 11,) provided that "on the trial of any person, for any of the offences (before mentioned,) or for any felony whatever, where the crime charged shall include an assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of assault for any term not exceeding three years." The mischief which this statute was intended to prevent is apparent, for at common law, a person indicted for a felony which involved an assault, must have been wholly acquitted, although found to have committed the assault charged in the indictment, and given in evidence as the means of committing the felony, if it happened that the felony was not fully committed. The same result followed if a felony had been committed to which the assault did not conduce, or if no felony had been attempted. This was found extremely inconvenient; for the prisoner, although proved guilty of a grave offence, of which he was accused, either escaped with perfect impunity, or a new indictment was preferred for the same assault, and the expense and trouble was incurred of another trial before another jury. And the first case after the passage of that statute fully illustrated its reasonable nature both for the public and the prisoner. For under its operation, a person indicted for a highway robbery, with violence, (one of the crimes mentioned in the act,) was convicted of a common assault, the jury finding specially that there was *no intention* to commit the felony charged, *Regina v. Ellis*, 8 Carrington & Payne, 654, (1838,) a result quite impossible at common law.

And this was shortly followed by *Regina v. Guttridge*, 9 Carrington & Payne, 471, (1840,) a case of a felonious assault upon a female, in which the felony being negatived, there was a conviction of an assault. In like manner one indicted for feloniously cutting another, with intent to murder him, or to do him some grievously

bodily harm, was convicted of an assault. *Regina v. Archer*, 2 Moody, C. C. 283, (1843); *Regina v. Elliott*, 1 Cox, C. C. 36, (1844); *Regina v. Day*, 1 Cox, C. C. 207, (1845); *Regina v. Nichols*, 9 Carrington & Payne, 267, (1840.) And so on an indictment for an assault with intent to rob. *Regina v. Boden*, 1 Carrington & Kirwan, 394, (1844.) Likewise on an indictment for the complete offence of robbery. *Regina v. Birch*, 1 Denison, C. C. 185; 2 Cox, C. C. 22; 2 Carrington & Kirwan, 193, (1846); it being the opinion of all the judges that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony.

Nor, on the other hand, was it to be extended to all cases where the indictment for the felony, on the face of it, charged an assault, but the true intent of the statute was considered to be that in order to convict of an assault, the assault must be included in the charge on the face of the indictment, and be part of the very act or transaction which the government prosecuted as the felony. And on this principle one indicted for manslaughter was found guilty of an assault. *Regina v. Pool*, 9 Carrington & Payne, 728, (1838); *Regina v. Anty*, 3 Cox, C. C. 282, (1847.)

But the statute itself gave rise to a difference of opinion and practice among the judges, and it was thought capable of two constructions; one, that a conviction was thereby warranted in every case, where the felony charged included an assault, upon the supposition that it was intended to do away with the distinction established in *Westbeer's case*, viz: that on an indictment for felony the prisoner could not be convicted of a misdemeanor included in such felony; the other, that the statute authorized a conviction of that assault which was offered in evidence on the part of the prosecution, in support of the felony charged. And some judges were accustomed to look at the evidence to see whether the statute applied, and others to look at the indictment. It was said that the act did not say where the crime of felony includes an assault, but when "the charge includes it."

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So it was frequently held that the assault of which the party could be convicted must be directly connected with the felony charged and not an independent, separate, and distinct assault. *Regina v. Guttridge*, 9 Carrington & Payne, 471, (1840); *Regina v. McPhane*, 1 Carrington & Marshman, 212, (1841); *Regina v. Barnett*, 2 Carrington & Kirwan, 594, (1848). In other words, that the assault should be directly involved in the felony itself. *Regina v. St. George*, 9 Carrington & Payne, 483, (1840.) Therefore, as murder by poisoning does not include an assault, it was held that, on an indictment for such offence, (not alleging any violence,) the prisoner could not be convicted of an assault. *Regina v. Dilworth*, 2 Moody & Robinson, 531, (1843.) So where three were indicted for murder, and the evidence proved that A in company with the other two, had made an assault upon the deceased, but that A had left the place some time before the fatal blow was given by the other two, it was held that A's assault was independent of the murder, and that he could not be convicted of an assault under that statute. *Regina v. Phelps*, 1 Carrington & Marshman, 180, (1841.) And on the same principle it was held by all the judges in the next year that, on a charge for burglariously breaking and entering a dwelling-house, with intent to commit a rape, the prisoner could not be convicted of an assault, although the evidence proved one; for the crime charged did not "include" an assault. *Regina v. Watkins*, 1 Carrington & Marshman, 148, (1841); though the application of the rule to the facts in this case has sometimes been doubted. Alderson, B., in 1 Eng. Law & Eq. R. 597. So, where one was indicted for manslaughter, and the evidence proved that the prisoner made an assault upon the deceased some time before her death, but that her death was owing to natural causes, the prisoner, it was held, could not be convicted of the assault for the reason before given. *Regina v. Connor*, 2 Carrington & Kirwan, 518, (1847.) Or, as had been expressed in an earlier case, *Regina v. Crampton*, 1 Carrington & Marshman, 600, (1842), in

order to convict a person of an assault under § 11 of 1 Vict. c. 85, it must be an assault which is the subject-matter of the charge, and embodied in the charge, and which would itself be the felony, but for some other cause. Otherwise, it would be easy in a case of manslaughter, to convict a person of an assault which had really nothing to do with the case, by merely stating it in the indictment as a part of the cause of death. No assault is included in a charge of manslaughter, which does not conduce to the death of the deceased, although the death itself be not manslaughter. See also to the same effect, *Regina v. King*, 2 Cox, C. C. 95, (1846); *Regina v. Greenwood*, 2 Carrington & Kirwan, 339, (1846); *Regina v. Sandys*, 1 Cox, C. C. 8, (1844.) So the statute did not allow the prisoner to be convicted of a felonious assault different from the felony charged, as, on an indictment for robbery, the defendant could not be convicted of an "assault with intent to rob." *Regina v. Reid*, 1 Eng. Law & Eq. R. 595; 2 Denison, C. C. 89; 5 Cox, C. C. 104, (1851.)

But the construction of the statute, and the practice of the different judges, was far from being uniform, and nice and subtle distinctions were often made. Thus, in *Regina v. Anty*, 2 Cox, C. C. 282, (1847,) where one was indicted for manslaughter, and the evidence showed that although the prisoner assaulted the deceased, yet that he died from the effects of beer and spirits administered to him, and not from the blows received, Platt, B., held that the prisoner might be convicted of an assault. And still later the same judge held in *Regina v. Rook*, 4 Cox, C. C. 400, (1850), that when on an indictment for murder, evidence was given of long continued violence and ill treatment of the deceased by the prisoner, yet the cause of death was inflammation of the lungs, quite unconnected with the prisoner's assault, he might be convicted of an assault under the statute. "The prisoner," said he, "is charged with causing death by beating. The beating is proved to have occurred up to a very short period of the death, and although it is shown now that

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such treatment was not the actual cause of the death, surely it cannot be said that the original blows did not form part of the original charge. It seems to me precisely the sort of case the statute was intended to meet." See also *Regina v. Pool*, 9 Carrington & Payne, 728, (1841); *Regina v. Lewis*, 1 Carrington & Kirwan, 419, (1844.) Another instance of the perplexity arising upon the construction of this statute, may be found in prosecutions for abusing and carnally knowing a female child under the age of ten years; for it was the opinion of some judges that on such an indictment the defendant could not be convicted of a common assault. *Regina v. Hughes*, 1 Cox, C. C. 247, (1845); *Regina v. Banks*, 8 Carrington & Payne, 574, (1838); *Regina v. Holcroft*, 2 Carrington & Kirwan, 341, (1846,) while an equal number were of directly the opposite opinion. *Regina v. Stevens*, 1 Cox, C. C. 225, (1845); *Regina v. Ashbolt*, 2 Cox, C. C. 115, (1846); *Regina v. Folkes*, 2 Moody & Robinson, 460, (1843); *Regina v. Hayes*, 2 Cox, C. C. 226, (1847); *Regina v. McKrue*, 8 Carrington & Payne, 641, (1838.)

Nor were these differences of opinion altogether owing to the haste of *nisi prius* decisions, for on the most elaborate argument before all the judges, twice repeated, where all the cases were carefully examined, and the judges gave written opinions, there was a division among them upon the question whether, when a person was indicted for murder and manslaughter by a series of beatings and assaults, and certain assaults were proved and relied upon by the prosecution as the cause of the death, but the surgeon who made the *post mortem* examination testified that the death was not occasioned by the assaults so proved and relied upon, but by a blow on the head, which there was no evidence to fix upon the prisoner, the accused could be convicted of the assault. Eight of the judges being of opinion that he could not, inasmuch as the assault contemplated by that statute must be a part of the very act and transaction prosecuted, and must also have conduced to the death. Six judges, including Lord

Campbell, C. J., were of the contrary opinion. *Regina v. Bird*, 5 Cox, C. C. 20; 2 Eng. Law & Eq. R. 448, (1851.)

The difficulties arising in the construction of this statute, soon after the decision in *Bird's case*, led to its entire repeal, by Lord Campbell's Act, 14 & 15 Vict. c. 100, (1851,) which provided, in sec. 9, "that any person indicted for a felony or a misdemeanor might be found guilty of an attempt to commit the same, and be liable to the same consequences as if charged with and convicted of the attempt alone." And sec. 11 declared "that a person indicted for a robbery might be convicted of an assault with intent to rob." Under which act, if the prisoner be charged with an aggravated robbery, he may be found guilty of an aggravated assault; and if charged with a simple robbery, he may be found guilty of a simple assault, without any additional count for the minor offence. *Regina v. Mitchell*, 12 Eng. Law & Eq. R. 588; 5 Cox, C. C. 541; 2 Denison, C. C. 468, (1851.) And thus stands the law of England at the present day, on the subject of allowing convictions of a minor offence on a charge for a greater. Let us now see how the law on this point is established in America.

In America, statutes were passed in many States at a much earlier day than in England, having the same object as Lord Campbell's Act, and without the obscurity and uncertainty attached to Lord Denman's Act in 1837. But even at common law, a more liberal rule has been applied on this side of the Atlantic, frequently allowing convictions for a less offence when the greater offence is not proved, where in England, owing to the reasons before given, the defendant would have been acquitted altogether. For in this country, persons accused of felony have always as many, and if any difference existed, more legal privileges, than those indicted for a misdemeanor. Courts, generally, therefore, have not felt called upon to follow the English rule; preferring the maxim, *cessante ratione cessat ipsa lex*. See *The People v. Jackson*, 3 Hill, 94, (1842); *The People v. White*, 22 Wendell, 177, (1839); *Stewart v. The State*, 5 Ohio, 241, (1831);

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The State v. Gaffney, Rice, 431, (1839.) There have been, indeed, one or two instances where *Westbeer's case* has been followed, and where it has been held that if an act charged to have been done "feloniously," be so found by the jury, but the act in law did not amount to a felony, but only to a misdemeanor, no judgment could be rendered on such a verdict. Such was the case of *The Commonwealth v. Newell*, 7 Mass. 249, (1810,) deciding that on a charge of feloniously breaking and entering a dwelling-house with intent to commit a mayhem, the prisoner could not be convicted of an aggravated assault, since the former was a felony at common law, and the latter only a misdemeanor. And this doctrine was followed and approved in the late case of *Black v. The State*, 2 Maryland R. 376, (1852,) in which the defendant was indicted for "feloniously" burning a stack of hay, but as this act was thought to be no felony, either at common law, or by any statute of Maryland, no judgment could be rendered on a verdict finding the defendant guilty of having done the act feloniously. See also *The State v. Wheeler*, 3 Vermont, 347, (1830.) But *Newell's case*, on which this was based, was itself partly founded upon a statute of Massachusetts, and has recently been overruled by the same court in *The Commonwealth v. Squire*, 1 Metcalf, 258, (1840.)

And there seems to be no good reason why the word "feloniously," in such cases may not be rejected from the indictment as surplusage, and the offence punished for what it really is, viz: a misdemeanor. See *The State v. Upchurch*, 9 Iredell, 455, (1849); *Hess v. The State*, 5 Ohio, (1831); *Lohman v. The People*, 1 Comstock, 379, (1848.) And the same reason which has induced courts in this country to allow convictions for a misdemeanor on a charge for a felony, where the latter includes the former, has also sanctioned the practice of joining a count for a misdemeanor with a count for a felony in the same indictment; *The State v. Boyes*, 1 McMullan, 190; *Burk v. The State*, 2 Harris & Johnson, 426, (1809); *The State v. Sutton*, 4 Gill,

494, (1846); which could not be done at the ancient English common law.

But to examine the adjudications in America on the general doctrine of allowing convictions of minor offences on a charge for a higher crime. The cases are numerous where it has been held that on an indictment for murder the accused may be convicted of a voluntary manslaughter, since both these are felonies at common law. *Reynolds v. The State*, 1 Georgia, 222, (1846); *The People v. Jackson*, 3 Hill, 92, (1842); *Brennan v. The People*, 15 Illinois, 511, (1854); *Slaughter v. The State*, 6 Humphreys, 410, (1846); *King v. The State*, 5 Howard, 730, (1841); *Brooks v. The State*, 3 Humphreys, 25, (1842); *Hunt v. The State*, 25 Mississippi, 378, (1853); *Watson v. The State*, 5 Missouri, 497, (1838); *Plummer v. The State*, 6 Missouri, 231, (1840); but not of involuntary manslaughter, where, by statute, such crime is made but a misdemeanor. *The Commonwealth v. Gable*, 7 Sergeant & Rawle, 423, (1831). And not of a simple assault and battery, where death has ensued from the blows to the party assailed; for that is simply a misdemeanor, and not included in any of the degrees of homicide. If an assault and battery results in death, it is either murder or manslaughter, and the misdemeanor is merged in the felony; or it is justifiable or excusable homicide, and in either event the simple assault and battery no longer remains as such to be punished. *Wright v. The State*, 5 Indiana, 527, (1854); *Burns v. The People*, 1 Parker, 182, (1848.) But if the death of the party assaulted has not ensued, or if the death arose entirely from some other cause than the assault, it has been held, that on an indictment for manslaughter by violence, the beating being proved, but not the manslaughter, the defendant might be convicted, at common law, of a simple assault and battery, without any count for that purpose. *The State v. Scott*, 24 Vermont, 127, (1852.)

But this was not the English common law, and it is somewhat questionable whether it is consistent with analogous principles. In *The State v. Valentine*, 6

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Yerger, 533, (1834,) it was determined that on a charge for maliciously stabbing, which is a felony, the defendant could not legally be convicted of merely an assault and battery.

This general subject was fully examined in *The Commonwealth v. Roby*, 12 Pickering, 504, (1832,) where it was held that on a trial for murder, the defendant could not be convicted of an assault with intent to murder; for the former is a felony, and the latter but a misdemeanor. The offences were said to be distinct in their nature, and of a distinct legal character. An indictment for murder necessarily charges the fact of killing, as the essential and most material fact, which gives its legal character to the offence. If the party assaulted, dies within the year and a day, the same act, which till the death, was only an assault and misdemeanor, although an aggravated one, is by that event shown to be a mortal wound. This event, strictly speaking, does not change the character of the act, but it relates back to the time of the assault, and the same act, which might be only a felonious assault had the party not died, is in truth shown by that event to have been a mortal wound; and the crime, which would have otherwise been but an aggravated misdemeanor, is thus shown to be a capital felony. The facts are essentially different, and the legal character of the crime essentially different. And it was thought that the English rule of not allowing convictions of a misdemeanor on an indictment for a felony, did not result, as generally supposed, "from considerations peculiar to the administration of justice in England, to wit, that a prisoner has privileges upon a trial for felony (? misdemeanor) not allowed in cases of misdemeanor, (? felony,) but from the broader consideration, that the offences are in legal contemplation essentially distinct in their nature and character." And *Newell's case*, 7 Massachusetts, 249, was distinctly approved.

Soon after the decision in *Roby's case*, and apparently occasioned by it, a statute was passed in Massachusetts, declaring

that, "whenever any person indicted for a felony shall, on trial, be acquitted by verdict, of part of the offence charged in the indictment, and convicted of the residue thereof, such verdict may be received and recorded by the court; and, thereupon the person indicted shall be adjudged guilty of the offence, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly." Rev. Sta. 1835, c. 137, § 11. Under this statute a person indicted for rape, or manslaughter, may be convicted of a common assault and battery, without any count for the lesser offence; a result quite impossible in that State at common law. *The Commonwealth v. Drum*, 19 Pickering, 479, (1837.) So, under the same statute, a man charged with rape upon his own daughter may be convicted of incest, if the jury find the criminal connection, but not by force, and against the will of the female. *The Commonwealth v. Goodhue*, 2 Metcalf, 193, (1840.) And in the case of *The Commonwealth v. Squire*, 1 Metcalf, 258, (1840,) the court took the broad ground that whenever acts which constitute only a misdemeanor are alleged to have been done feloniously, and the defendant is found guilty by the jury, the word feloniously may be rejected as surplusage, and the defendant be punished for the misdemeanor; overruling in this respect the earlier case of *The Commonwealth v. Newell*, 7 Massachusetts, 245, which was said to have been decided under the St. 1805, c. 88, which was repealed by Rev. Sta. c. 137, § 11. And, indeed, in looking at the matter practically, as it regards the accused, we can perceive no possible injury, said the court, that can result to a party, charged with an offence, from the introduction of the word feloniously in connection with a charge of a misdemeanor. The case is to be tried, as to the guilt of the party, in reference to the facts alleged against him. If the perpetration of the acts, in the manner charged, be proved, and those acts do constitute a felony, the felonious character of the act is established; and if they amount

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only to a misdemeanor, they are not committed feloniously, because the acts themselves do not constitute a felony; and they proceeded to declare it "the more sound common-law rule, that an indictment, defective in not charging facts necessary to constitute a felony, may yet be sufficient to authorize the jury to convict, and the court to award sentence as for a misdemeanor." And the same court, in a subsequent case, acting under the same statute before cited, held that the defendant, when charged with an assault with intent to ravish and carnally know, might be convicted of a common assault; *The Commonwealth v. Fischblatt*, 4 Metcalf, 354, (1842,) a result frequently arrived at in other States, at common law.

There seems to be no doubt but that a person indicted for an assault with intent to murder, may be convicted of an assault with "intent to kill;" since the latter offence is included in the former. *The State v. Nicholls*, 8 Connecticut, 496, (1831); *The State v. Waters*, 39 Maine, 54, (1854.) Or even of a common assault and battery; since an assault, with intent to murder, is at common law, only a misdemeanor, and even the English rule would not be thereby violated. *The State v. Coy*, 2 Aikens, 181, (1827); *Stewart v. The State*, 5 Ohio, 241, (1831); *The State v. Stedman*, 7 Porter, 495, (1838); *The State v. Kennedy*, 7 Blackford, 233, (1844); *Gardenheir v. The State*, 6 Texas, 348, (1851); *Clark v. The State*, 12 Georgia, 350, (1852); *Cameron v. The State*, 8 English, 712, (1853.) But not of "being accessory before the fact, to an assault with intent to kill" the deceased; because such an offence is not included in the charge. *The State v. Scannell*, 39 Maine, 68, (1854.) And see *Rex v. Plant*, 7 Carrington & Payne, 575, (1836.) And for the same reason on an indictment for an assault with intent to commit mayhem, the defendant might be convicted of a common assault and battery. *McBride v. The State*,

2 English, 374, (1847.) And on a charge for robbery, which is but larceny accompanied with violence, there may be a verdict of guilty of simple larceny, if the force be not proved; for both are felonies. *The People v. McGowan*, 12 Wendell, 386, (1837.) And some cases hold that on a charge of rape, if the complete offence be not proved, the prisoner, at common law, may be found guilty of an assault with intent to commit that offence, without any additional count. *The Commonwealth v. Cooper*, 15 Massachusetts, 187, (1818); *The State v. Shepard*, 7 Connecticut, 56, (1828.) *Sed quære*; for the one is a felony, and the other but a misdemeanor. And see *The Commonwealth v. Roby*, 12 Pickering, 507. And besides; at common law, a person indicted for a misdemeanor could not be convicted of an attempt to commit that offence. But there is no doubt that a defendant indicted for breaking and entering with intent to steal, and stealing therein, may be convicted of simple larceny. *The State v. Cocker*, 3 Harrington, 554; *The State v. Brady*, 14 Vermont, 356, (1842); *Jones v. The State*, 11 New Hampshire, 269, (1840); *ante*, 46, and note. So a person charged with the crime of seduction, made such by statute, may be convicted of fornication. *Dinkey v. The Commonwealth*, 5 Harris, 126, (1851.) And the same result has been allowed on an indictment for adultery, at common law. *Respublica v. Roberts*, 1 Yeates, 6, (1791); *The State v. Cowell*, 4 Iredell, 231, (1844.) And on a charge for a riotous assault and battery, a verdict of simple assault and battery is good. *Shouse v. The Commonwealth*, 5 Barr, 83, (1847.)

And these cases all proceed upon one and the same ground, that if any part of the offence charged be proved, that part being necessarily included in the whole, there may be a conviction of such part as may be proved.

E. H. B.

- COMMONWEALTH v. SAMUEL GREEN.¹

● March Term, 1822.

New Trial — Power to grant — Illegal Testimony.

This court has power to grant a new trial, on the motion of one convicted of a capital offence, sufficient cause being shown therefor.

The admission of illegal testimony against the prisoner on his trial, after objection by his counsel, would be a good cause for granting a new trial.

Objections to the competency of a witness, founded on a conviction of crime, must be made at the trial, and when the witness is offered to be sworn; and must be supported by the record of the conviction and judgment.

The conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness in the courts of this State.

THIS was a motion for a new trial. The prisoner, Green, and one Howard Trask, convicts in the State prison, were indicted at the last November term in this county,² for the murder of Billy Williams, a negro, and a fellow-convict with them in that prison. Trial was had on the indictment at the same term; when Green was convicted of the crime of murder, and Trask was found not guilty, by reason of insanity. On the trial, several witnesses were produced and sworn on the part of the government; among whom was one Sylvester Stoddard, who had been convicted of larceny, and was under sentence for the same in the State prison at the time the murder of Williams was committed; but had been pardoned, previously to the trial, by the executive of the Commonwealth, and was admitted by the court as a competent witness.

After the verdict and before sentence was pronounced, information was received by the counsel for Green, that Stoddard had been formerly convicted of a felony in the State of New York, and had been punished by confinement to hard labor in the penitentiary in that State. Upon the suggestion of this information to the court, judgment was respited, to give opportunity for the verification of the facts suggested. Afterwards a record of the conviction in a court in New York was obtained, by which it appeared that Stoddard had been

¹ 17 Massachusetts, 515.

² By the statute of 1805, c. 113, § 11, it is "enacted, that respecting all crimes and offences, which may be committed in the State prison aforesaid, and the precincts thereof, the said prison and precincts shall in all judicial proceedings, be deemed and taken to be as well within the county of Suffolk, as within the county of Middlesex."

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convicted of the crime of larceny. Whereupon the following motion was submitted to the court: "Now after verdict and before judgment, the said Samuel Green moves the court for a new trial, for the following cause, namely, because one Sylvester Stoddard was produced, sworn and examined in behalf of the Commonwealth, and was a material witness in support of the prosecution; and it has been discovered since the trial, that said Stoddard was convicted in the year 1816 of larceny, committed in the city of New York, and sentenced, according to the laws of the State of New York, to imprisonment for a term of time, in the State prison or penitentiary of that State; whereby he was rendered infamous, and incompetent to be sworn as a witness."

The cause was argued upon this motion, at the last term, by *Bassett* and *Curtis* for the prisoner; and by the attorney and solicitor-general for the Commonwealth.

Curtis. I admit that in England this motion could not be sustained. The practice is there well settled, that in case of any irregularity in the trial of a capital indictment, not apparent upon the record, which renders the conviction improper, the prisoner is recommended by the judge to the mercy of the crown; and this recommendation is usually followed by a pardon. But this course, however expedient under a government of prerogative, is not suited to the spirit of our free institutions; it leaves too much to the discretion of the court and the executive. The rights of the citizens of the United States stand upon a firmer and more substantial basis. They do not depend upon the caprice of any magistrate, however elevated.

We are not aware that the law has yet been settled in this Commonwealth, by any decisions; nor is there any long established usage, which binds the court to refuse a new trial in capital cases, upon motion of the prisoner. The maxim, *Nemo bis debet Vexari, pro una et eadem causâ*, was established in arbitrary times, for the benefit of the prisoner, to protect him against a second prosecution, when the verdict of the jury had established his innocence. The humane founders of this principle of law intended it as a shield to the unfortunate object of royal jealousy; not as an instrument of oppression. It is obvious, then, that the spirit of the rule will not only justify, but obliges the court to grant a second trial upon motion of the prisoner, when he has been improperly convicted. This is a right *in favorem vitæ*, and is so well founded in reason, that it seems unnecessary to cite authorities in support of it; but we beg leave to refer the court to two decisions on the subject; which are the only instances we have been able to find, of new trials being granted in capital cases.

In 1799, John Fries was indicted for high treason against the

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United States. After a trial which occupied fifteen days, he was convicted; but before sentence, a new trial was moved for by his counsel, because one of the jury had used expressions indicative of prejudice against the prisoner, which, it is to be observed, was discovered after the conviction. The learned counsel for the prosecution seems to have taken it for granted that a new trial might be had for sufficient cause; but he resisted the motion on the ground, that the prejudice complained of might have been discovered before verdict, and would have constituted a good cause of exception to the juror. The court however, without hesitation, granted a new trial. 3 Dallas, 515. The Supreme Court of South Carolina, in case of a conviction of a capital offence, ordered a new trial for the same cause which was assigned in *Fries's case*. *The State v. Hopkins*, 1 Bay's Rep. 372. An equally stubborn rule of criminal law is that, which prohibits the discharge of a jury impanelled to try an indictment, without rendering a verdict. Yet in *Kinloch's case*, Foster's Crown Law, 22, the jury was discharged from a capital indictment, and a new jury was afterwards impanelled; and in a late case, in New York, the same thing was done in a trial for manslaughter. *The People v. Goodwin*, 18 Johns. 187. In indictments for offences not capital, new trials are readily granted, both in England and in this Commonwealth. 13 Mass. Rep. 221; 5 Mass. Rep. 53; Ibid. 261.

With these views we take it for granted, that a new trial of a capital indictment would be granted by the court, for proper cause; and we now come to the second question in this case, namely, whether the discovery of the witness's infamy, after verdict, is a sufficient cause to entitle the prisoner to this privilege; and this inquiry is prior, in its nature, to the question on the effect of a conviction in another State. For if the objection to the witness comes too late, the motion must of course be overruled. The strict rule of law, it must be admitted, requires the party, who seeks to exclude a witness by reason of infamy, to be provided, at the trial, with a copy of the record of his conviction, and judgment thereon; and that no evidence short of this can be admitted, to prove the infamy. But in civil actions, new trials are often granted, where either party has been surprised by evidence which he did not expect, and which he could have controlled, if he had been aware of its production against him; and in a late case this court ordered a new trial, because the defendant's bail was received as a witness in his favor, although the objection was not made at the trial, and the record showed the fact.

Had the prisoner, in the case at bar, been provided with a copy of the record of the conviction in New York, the witness must have been excluded, unless the pardon granted by the executive of this Commonwealth restored him to competency, which is a point we

shall consider presently. But he was ignorant, until the moment that Stoddard was sworn, that he would be offered as a witness against him; and it was thus impossible for him to be furnished with the necessary document to prove his infamy. It was a perfect surprise upon the prisoner, that the government should produce felons and convicts in support of the prosecution; and the subsequent events show that, if he had been aware of the course to be pursued, he could have excluded the testimony of one of them, and probably that of the other also. It is here to be remarked and remembered, that these *white-washed felons*, (whose mouths would have remained forever closed, had not the executive pardoned them for the purpose of making them competent witnesses,) furnished the only positive and direct testimony against the prisoner.

In civil actions, new trials are granted on affidavit of surprise by the production of unexpected testimony, or the discovery of important evidence. The present motion falls within both these limits, and is as much more entitled to favorable consideration, as the life of a fellow-being is more important than any question concerning property. Suppose that, after a conviction of a capital offence, upon the undisputed testimony of two or more witnesses, the prisoner discovers that they are all men of bad character, who have been convicted of felonies; and consequently that he has been convicted on incompetent evidence, having had no means of discovering their characters, or even their names, before the trial; is it possible that the court would refuse a new trial, under these circumstances, and remit the convict to a doubtful application to the executive for a pardon? It is believed that the court would never deprive themselves of the power of causing justice to be done to any individual, convicted in this manner. If the court would feel bound to order a new trial, where all the witnesses were discovered to be incompetent, they will feel equally bound to do so, where only one is impeached. For it is impossible for them to say how much influence that man's testimony had upon the verdict. But it is certainly unnecessary to labor this point more.

The next question is, whether the conviction of Stoddard before a court of competent jurisdiction in New York, renders him incompetent to testify in our courts. It is not denied that a conviction of felony disqualifies the party from testifying in any court in New York. This is not by virtue of the provisions of any statute, but is a part of the common law, as well of this State as of New York; and results from the infamy of character and loss of moral principle, which are manifested by the commission of the crime. If this rule is founded in reason, and a just perception of human character, it is plain that an individual whose crimes render him unworthy of belief

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in one place, cannot be entitled to credit in another. A term of years, spent in repentance and reformation, might restore him to virtue and its privileges; but the supposition, in the present case, is negatived by the facts before the court, which show that the witness had hardly quitted the State prison in New York, before he was sentenced to that of Massachusetts. If the ground assumed by the government is tenable, it must be by force of some technical rule, respecting the operation and effect of foreign judgments. We are ready to admit that, although the moral turpitude of a person convicted of felony in England or France, would be the same as if convicted here, or in New York, yet from the impossibility of producing the record of his conviction, or any document of equal validity, his infamy could not be proved according to the rules of law. The witness would therefore be entitled to be sworn. But the judgments of the States, composing the Federal Union, are not foreign judgments. The Constitution of the United States provides, "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and congress may, by general laws, prescribe the manner, in which such acts, records, and proceedings shall be proved, and the effect thereof." Art. 4, § 1. This duty congress has performed; and in compliance with these provisions, it has been decided by the highest authority, that the judgments of the courts of the several States, when duly authenticated, have the same force and effect in every other State, as domestic judgments. 7 Cranch, 481. In the present case, therefore, there is no technical difficulty arising from the non-production of the record; since the laws of the United States declare a copy authenticated in a certain manner, to be of equal validity with the original. Unless there is a distinction between the civil and criminal proceedings of the State courts, and I am not aware that any is made in the constitution or laws of the United States, or by their courts, it should seem that the legal effect of a judgment of a court in the State of New York is no longer open to inquiry. The courts of this State are bound to give it the same effect here, which it would have there. The effect which the judgment against Stoddard would have in New York, has been already stated.

A brief consideration of the powers of the executive will furnish an answer to the inquiry, whether the governor and council of this State can restore an individual to competency, who has been considered incompetent by conviction of felony in another State. The executive of this State is vested with all the authority formerly possessed and exercised by the king of England, subject, however, to one important limitation in the Constitution, ch. 2, § 1, art. 8, which provides, that no charter of pardon, granted before conviction, shall

be of any avail whatever. In Great Britain, the king is the supreme head of the government; all process runs in his name, and all offences are supposed to be committed against him, and in derogation of his sovereign authority. The power of remitting the punishment of offences naturally belongs to the individual offended, and thence arose the prerogative of granting pardons. But it is a solecism in terms, to declare that any man, or body of men, can forgive a crime against the authority or rights of another; and therefore even the king of Great Britain has never claimed the right of pardoning, unless the offender was convicted in his own courts. The total silence of the books upon this subject, justifies us in assuming, that he has never pretended to exercise this power; although it cannot be doubted that instances have occurred where the employment of it would have been desirable and expedient. If the king of Great Britain does not possess this power, the governor and council cannot claim it; for it will not be asserted that the latter have more ample powers than the former.

We think it plain, therefore, that Stoddard's disability could not be removed by pardon from the executive of this Commonwealth. Nor, if it could be, have the governor and council exercised their supposed authority in such a manner as to effect this object. "To render a pardon valid, it must express with sufficient accuracy the crime it is intended to forgive. It seems to be the better opinion, that the crown cannot pardon any crime with effect, without specifically naming it; for the courts will not intend his majesty to be informed of the particular offence, of which the defendant has been convicted." 1 Chitty's Crim. Law, 771. The authorities cited by Mr. Chitty fully support this position. The charter of pardon, granted to Stoddard, specifies only two convictions, both of which were before this court, sitting in Berkshire; and although it concludes with general words, comprehending all felonies, the books show that these general words are of no avail.

It is then hoped that we have shown that this court has power to grant a new trial, for proper cause, in a capital case; that the incompetency of a witness, from infamy of character, is a proper and sufficient cause, although discovered after conviction; that the conviction of felony, before a competent tribunal in another State, affects the competency of the party, in the same manner as if the judgment were rendered by a court of this Commonwealth; that such disability cannot be removed by pardon from the executive of this Commonwealth; and that, if it could be, the governor and council have not exercised their power in this instance, in such a manner as to restore the witness to competency and credit. From all which it would seem to follow, that the prisoner is entitled to a new trial.

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The *Solicitor General* stated, that there had been no instance, either in England or in this Commonwealth, where a new trial had been granted in a capital case. It is said in 1 Chitty C. L. 654, to be "completely settled," that no new trial can be granted in treason or felony; and that the course, at common law, had been uniform, if, in the opinion of the court, the conviction was improper, to respite execution, and recommend the prisoner to mercy. And in the case of *The King v. Mawbrey & al.* 6 D. & E. 638, Lord Kenyon says: "no new trial can be granted in cases greater than misdemeanors." The same doctrine is laid down in 13 East, 416, note b. It seems therefore unquestionably settled in England, that no new trial, in a capital case, ever was, or can be granted.

In the case of John Fries, in the Circuit Court of the United States, a new trial was indeed granted. But it is apprehended, that this court will consider itself no further bound or influenced by that decision, than the reason and circumstances of the particular case will warrant. It will be remarked that only two judges were on the bench when that question was decided; and that they differed in opinion upon the right or expediency of granting a new trial.

The cases in this Commonwealth which have a bearing upon the question, are those of *The Commonwealth v. Hardy*, 2 Mass. Rep. 303, and *The Commonwealth v. Drew*, 4 Mass. Rep. 391. In the former of these cases, nothing was settled, which is applicable to the present question. There was no new trial moved for, for the prisoner had never been tried, although there was a verdict against him. He had never been legally arraigned, and of course there could have been no trial; the arraignment and plea being an indispensable part of the trial. If he had been arraigned and put to plead before the sheriff, or one of the bar, the arraignment would have been as valid in law as it was in that case; the law requiring a full bench to be present at every part of the trial of a capital offence. In *Drew's case*, the decision, under circumstances very similar to those of the present case, was against a new trial. And by the current of decisions, even in cases not capital, no new trial has been allowed on account of the discovery of evidence after the trial, of a nature similar to that now complained of. *Commonwealth v. Waite*, Vide 5 Mass. Rep. 261. The court, therefore, in the present case, must resort to original principles, and apply them to the laws and constitutions of this country, in order to decide upon the legality of the present motion; and if, upon such inquiry, the court should find it proper to depart from the ancient principles and usages of the common law in England, or from the spirit of what appears to have been the rule of decision in the case of *The Commonwealth v. Drew*, their decision will be cheerfully acquiesced in by the officers of the government.

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The Solicitor General thought it his duty to state, that he could not perceive either the justice or the policy of the course of procedure in the English courts, in refusing a new trial in capital cases, under circumstances which would undoubtedly induce them to grant one in misdemeanors, and even in civil actions. The granting of a new trial, upon motion of the prisoner, is not only not repugnant to the ancient maxim, that his life shall not be put in jeopardy twice for the same crime; but it is really granting him a privilege, which may operate to save his life, by standing a second trial for it. If, in the case at bar, the court find themselves authorized to grant a new trial, then the common rules applicable to all similar cases, are relied upon, viz., that it will not be granted as a matter of course: and that it is wholly in the discretion of the court, to grant or refuse it; and from what appeared on the trial in this case, there is no ground for the present motion. The evidence against the prisoner was clear and satisfactory, without the testimony of Stoddard, the pardoned witness. The fact of his conviction was probably known to the prisoner, at the time of the trial, and no objection was then made to his competency. No legal evidence of his conviction was at hand, or had been then obtained; and if the objection had been made to his competency, on the ground of his conviction, it could not have prevailed.

With respect to the effect, which the conviction of Stoddard, in the State of New York, had upon his competency as a witness in the courts of this State, the Solicitor General considered the question as one of great importance and delicacy; but as the Attorney General had investigated that point in the cause particularly, the authorities bearing upon it were left for him to produce.

The *Attorney General* observed that, since this motion had been made, he had looked into the subject, rather with a view to find a sanction for the exercise of the authority of the court to grant a new trial in a capital case, after conviction, than the contrary doctrine; because it may be true, that although an incompetent witness may have been admitted, who ought to have been rejected, yet the court may have been convinced that, independent of his testimony, the other evidence in the case would have been sufficient to convict the party. In such case public justice would require that he should not be recommended for pardon, which is the practice in England, and on the other hand, as the testimony of the incompetent witness may have had some weight in the minds of the jury, in producing his conviction, it would seem right and proper, *in favorem vitæ*, that he should have a new trial. Indeed, Judge Blackstone, in treating of criminal prosecutions generally, observes that, in many instances, where, contrary to evidence, the jury have found the prisoner *guilty*,

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the verdict hath been *mercifully* set aside, and a new trial granted by the Court of King's Bench, but never after *an acquittal*. 4 Com. 355. But an examination of the authorities cited by the learned commentator to this point, (1 Lev. 9; T. Jones, 153; 10 St. Trials, 416,) will show that they are all cases of misdemeanors only. As to capital offences, the law in England seems to be perfectly established that no new trial can ever be granted,* whether after conviction or acquittal. The same opinion seems also to have been entertained by this court, in the case of *The Commonwealth v. Drew*, referred to by the Solicitor General, by their refusing to hear the evidence of the facts suggested as the ground for a new trial; and which, if true, would have been sufficient for the purpose, in any case not capital. It seems, however, that the Circuit Court of the United States in the case of John Fries, and the Supreme Court of South Carolina in another case, have adopted a different course, and whether the reason on which the American cases are grounded is sufficient to induce this court to adopt a similar course, or not, is respectfully submitted to them. It is, however, important to future practice, that the law on this point should be decisively settled. But if the point were yielded, as to the general authority of the court, it is confidently relied, that in the case at bar, no new trial will be granted. Stoddard was a competent witness in this court; he had received a general pardon of all felonies and misdemeanors, from the supreme executive of the Commonwealth. The effect of such pardon, according to Judge Blackstone, Lord Hale, and other standard writers, is not so much to restore his *former*, as to give him a *new credit* and *capacity*, and, in fact, to make him a competent witness. So far then as the authority of our executive extends, which is throughout the Commonwealth, so far is the party pardoned a competent witness, and all the courts of law within the Commonwealth are bound to respect such pardon, and to give to it all its legal effects, one of which is to admit him in all such courts as a competent witness, leaving his credibility to the jury. It would be absurd to say that the sentence of a judicial court under a foreign jurisdiction, should have the power to control the constitutional rights and authority of the supreme executive of this Commonwealth, within its own jurisdiction. If a person in England had been pardoned by the king, by the effect of which he was made a competent witness, can it be supposed, that the producing of the record of a conviction of the same person in Holland or France would be admitted in the English courts to be a sufficient cause for rejecting him as incompetent, and so to control the effects of the king's pardon within the realm? No such case is to be found in the English books; although it is probable, that frequent instances of such foreign convictions must have occurred, and the parties afterwards

used as witnesses, it is plainly to be inferred, that such effect of a foreign conviction has never been suggested. It may be, and it probably is the case, that the record of such convictions has been used to impeach the credit of a person offered as a witness, but never to render him incompetent. This ought, as we contend, to be its utmost effect here.

The article in the Constitution of the United States, which has been relied on, and which provides that full faith and credit shall be given, in each State, to the public acts and judicial proceedings of every other State, can have no bearing on this question. Full faith and credit is given to the judicial proceedings of the State, where the conviction was had, as much by suffering an authenticated copy of such conviction to be read to the jury, for the purpose of affecting the credit of the witness, as by the court's rejecting him as incompetent.

We do not deny that instances have occurred at *nisi prius*, in which the record of such a conviction has been held by the judge, to render a person incompetent to testify. But this has originated from a spirit of comity, more than as grounded on principle. Such cases have all passed *sub silentio*, without argument or discussion, or even objection. But if it were legally correct to reject such witnesses as incompetent; yet it is contended, that the effect of a pardon intervening ought to render the person competent in the courts of this State; or, in other words, the effects of a pardon should be coextensive with the effects of the conviction. The question is of importance, not only to the humane distribution of public justice, but also to the sovereignty of the State. If it be sovereign within the limits of its jurisdiction, it must be able to protect its own laws and constitutions, and to give them all their legal effects within those limits. If the effect of the pardon of Stoddard be, to make him a competent witness in all the courts of the Commonwealth; then his being used as a witness, in the trial of this cause, was correct and legal, his conviction in New York notwithstanding; and furnishes no reason for granting a new trial.

Bassett, in reply, admitted that it was laid down, by the English authorities, that in capital cases a new trial cannot be granted. But he believed that no case could be found where this question had been deliberately settled, upon full argument. Indeed, such a rule was not founded upon sound principles of justice, and this would account for the silence of the books, in not stating any reasons in support of it. The maxim of the common law, that no one shall be twice put in jeopardy for the same offence, does not apply to the present case.

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The true meaning of the maxim is, that no person, who has been once fairly and fully tried for a crime, and acquitted, shall be again exposed to punishment for the same offence; but the verdict in his favor shall be his security. To deny the accused, who has been improperly convicted, the right to be tried a second time, upon his own application, would be manifestly repugnant to that humane principle of the law. The rule contended for by the counsel of the government was adopted in England from principles of policy, which apply to the particular form of government in that kingdom; but which have no application to our own. In arbitrary times, the power of granting a new trial, or, which involves the same principle, the power of withdrawing a juror, in capital cases, was made the instrument of oppression and cruelty. The public prosecutor was permitted to arraign the accused, and put him to the bar for trial; and after the evidence on the part of the crown was found to be insufficient to procure a conviction, the jury were dismissed, and the accused again exposed to trial, when further evidence had been obtained. From this abuse of power by the court, it became necessary to establish the rule, that a second trial could not be granted in capital cases. But, to prevent the injustice which would result from a strict adherence to the rule, a discretionary power of some sort must be vested in the court. Hence, in England, whenever any equitable considerations in behalf of the accused appear, so that, after conviction, he is thought to be a proper subject of mercy, upon the recommendation of the court, application is made to the crown for a pardon. This practice has never been adopted by the courts in this country, and such a practice would be contrary to the genius of our government. The accused has the right of being fully heard, and fairly tried, by his peers, and this right is secured to him by the Constitution of this State. In the twelfth article of our Declaration of Rights, it is said, "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him, or be compelled to answer or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him, face to face, and to be fully heard in his defence, by himself or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Admitting the court have the power, does the present case require them to exercise it? This must depend upon the general question, whether a person who has been convicted of felony in one State, by

a court of competent jurisdiction, can be a competent witness in another State. Upon this point no authorities which have a direct bearing can be found, with the exception of Glassford, a recent Scotch writer, who seems to imply by his remarks, that a person convicted of an infamous crime in England, could not be permitted to testify in a court of justice in Scotland. The reasoning, therefore, upon this question must be founded on a consideration of the general rules of evidence, and of our peculiar forms of government. It is a rule of evidence, that the conviction of any crime, which amounts to the *crimen falsi*, is a good cause of exception against a witness; and that it is the infamy of the crime, which destroys his competency, and not the nature or mode of the punishment. In other words, the disqualification follows as a consequence, but makes no part of the sentence. The conviction, in a court of competent jurisdiction, gives a legal existence to the crime; but, in a moral point of view, cannot change the nature of the offence. The same infamy will attach to a crime, whether it be committed in one State or in another; and it is not easy to perceive why the same consequence should not follow.

It may be said that the record of a conviction is the only evidence to prove the incompetency of a witness, and that the record of a foreign court is not conclusive. This argument applies to the English practice, where the production of the original record is required to disqualify a witness; and since a foreign judgment can be proved only by a copy of the record, which is in its nature parol evidence, it goes to the credibility of the witness, and not to his competency. But judgments rendered in any one of the United States, are not considered in the other States as foreign judgments in this sense. The federal Constitution provides, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and it has been decided in the Supreme Court of the United States, although the court were divided in opinion, that a judgment rendered in one State, shall have full force and effect in every other State. Whether a judgment rendered in one State have full force and effect in every other, it is not necessary to decide in the present case; for, if full faith and credit be given to the record, the fact of conviction is established, and the incompetency of the witness follows as a consequence, but makes no part of the sentence. It is also declared in the Constitution, that each State has jurisdiction over all offences committed against and within that particular State. Since then the record of conviction in one State is evidence in every other State of the subject-matter of the conviction; the jurisdiction of the court, and the nature of the offence, will be apparent from the record itself. For the offence, committed in that

particular State, being the subject-matter of the conviction, no other State could have jurisdiction of it; and the nature of the offence will determine the legal incapacity of the witness.

A further argument is derived from the relation, which the state governments and that of the nation bear to each other. They may be considered in the light of kindred systems, and as parts of one whole. In some cases, the state courts have concurrent jurisdiction with the national; and in all cases, where the rights of citizens of different States are to be tried, the ultimate decision may be had in the national court. If the principle contended for on the part of the prosecution be established, it will follow that a witness, who is rendered incompetent in a state court, may be permitted to testify, when the rights of the same parties are tried in the federal court; and a person convicted of an infamous crime in the highest court of the nation, and rendered incompetent to testify in that court, may nevertheless, be admitted as a competent witness in the state courts. Principles of policy, therefore, come in aid of the general rule, and seem to require that a person who has been convicted of a crime in one State, which renders him an incompetent witness there, should not be permitted to testify in a court of justice in another State.

It has been contended by the counsel for the government, that the future discovery of evidence of this nature is not a sufficient cause for a new trial; and the case of *The Commonwealth v. Waite* has been cited in support of the position. Upon examining that case it will be found that the facts subsequently discovered were of a nature to affect the credibility, and not the competency of the witness. It can therefore have no application to the present case, if the view which has been taken of it be correct. The argument is, that Stoddard, by his conviction in New York, was rendered an incompetent witness; and, as the fact of conviction was not known at the trial, nor could be drawn from him on the stand, the not producing the record ought not to prejudice the prisoner, whose life was put in jeopardy. Nor could the pardon of the executive of this State restore his competency as a witness. By the Constitution of this State the power of pardoning all offences is given to the governor and council; which evidently means all offences committed against and within this Commonwealth. The State of New York has jurisdiction of all offences committed against and within that State; and the power of pardoning all such offences belongs to the sovereignty of that State, and cannot be exercised by the authority of another State. It is not pretended, on the part of government, that a pardon has been obtained from the proper authority of New York. The incompetency of Stoddard, then, still exists; and, it is confidently believed, is a just cause for a new trial.

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The indictment was continued to the present term, for the consideration of the motion; and now the opinion of the court was delivered by

PARKER, C. J. The prisoner, having been convicted by the verdict of a jury of the crime of murder, at the last term of the court, moved for a new trial; because, as alleged in his motion, one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of larceny, in a court having jurisdiction of the offence, within the State of New York, whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this Commonwealth. A copy of the record of that conviction has been produced in support of the motion; and sufficient evidence has been given, to satisfy the court, for the purpose of sustaining this motion, that the Sylvester Stoddard, who was sworn and examined on the trial of the prisoner, was the subject of that conviction. It appeared also, that judgment was rendered upon that conviction, and was executed upon the convict, within the public prison of the State of New York.

It has been argued by the Attorney and Solicitor-General, that by law a new trial cannot be granted of a capital felony; and it appears by the English text books, and by several decisions cited in support of the position, that in cases of felony, a new trial is not usually allowed by the courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here.

That a prisoner who has been tried for a felony and *acquitted*, should not be subjected to a second trial for the same offence, seems consistent with the humane principles of the common law, in relation to those whose lives have been once put in jeopardy. But the same humane principles would appear to require, that after a *conviction* a prisoner should be indulged with another opportunity to save his life, if any thing had occurred upon the trial which rendered doubtful the justice or legality of his conviction. *Nemo bis debet vexari, pro una et eadem causa* is a maxim of justice, as well as of humanity, and was established for the protection of the subject, against the oppressions of government. But it does not seem a legitimate consequence of this maxim, that one, who has been illegally *convicted*, should be prevented from having a second inquiry into his offence, that he may be acquitted if the law and the evidence will justify an acquittal. It is true that in England the utmost caution is used on capital trials, in favor of life; and if an irregularity materially affecting the trial, occurs to the injury of the accused, the court

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usually represents such matter to the crown ; and a pardon is generally granted. But it is the right of every subject of that country, and of every citizen of this, to have a fair and *legal* trial before his peers, the jury, and it is hardly consistent with that right that it should be left to the will or discretion of the judge, whether a representation of an actual irregularity shall be made to the pardoning power ; or to the discretion of the latter, whether that power shall be exercised in favor of a person unlawfully convicted. Where the error appears of record, in either country, the court will arrest the judgment after a verdict of guilty ; and the party may be again indicted and tried for the same offence. If the error does not appear of record, but arises from inadvertency of the judge, in rejecting or admitting evidence, or from misbehavior of the jury, or other cause which would be good ground for a new trial in civil actions or misdemeanors, justice and consistency of principle would seem to demand that the person convicted should, upon his own motion, have another trial, instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it. It is not enough that the life of the accused will generally be safe in the hands of such highly responsible public agents. The right of the subject to be tried by his peers, according to the *forms* as well as principles of law, is the only *certain* security, that *at all times and under all circumstances*, that protection, which the Constitution extends to all, will be effectually enjoyed. Nor is it for the public safety and interest that new trials should be refused in such cases. For it must be obvious that in most cases of irregularity, which would be a good cause for another trial, if in the power of the court to grant it ; a pardon, upon the representation of the court, would be thought to follow of course ; and thus, in many cases, public justice might be prevented on account of defect in form, or some irregularity not affecting the merits of the case, which mischief might be avoided by another trial.

For these reasons we think there is a power in this court to grant a new trial, on the motion of one convicted of a capital offence, sufficient cause being shown therefor, notwithstanding the English courts are supposed not to exercise such authority ; and if this opinion needs support, the case of John Fries, who, after conviction of treason, was tried a second time ; and the case in South Carolina, cited at the bar from Bay's Reports, are sufficient for this purpose. In the case of *The United States v. Fries*, Mr. Rawle, the district attorney, admitted the power of the court to grant a new trial, and argued only against the propriety of exercising the power in that case. Judge Iredell expressly admitted the power ; and Judge Peters, who was against a new trial, although he yielded to the circuit judge, did not deny the authority of the court to grant it. In a late case

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also in New York, *The People v. Goodwin*, which was a case of felony, it was decided that the cause might be taken from the jury, and a new trial ordered.

Assuming, then, that this court has the *power* to grant a new trial in cases like the one before us, we are to inquire whether the facts, upon which the present motion is founded, are of a nature to require the exercise of that power; and if not, whether in the discretion of the court it ought now to be exercised. If illegal testimony was admitted against the prisoner on his trial, after objection by his counsel, it would be a cause without any doubt. For although the opinion of a majority of the court, sitting in a capital trial, is final and conclusive, yet it is their duty to revise such opinions as they may have opportunity, and if any of them, materially affecting the cause, should appear to have been erroneous, for want of time and means of information in the course of the trial, it would also be their duty, either to certify the fact to the executive, or to grant a new trial if the prisoner should request it, in order that the error might be corrected. The latter course would be the most proper, for, as the court can exercise no control over the executive, whatever confidence they might feel in that department, they would be unwilling to commit to other hands, in a case affecting life, an error committed by themselves, or by others concerned in the trial, the regularity of which they are bound to enforce. The supposed error in this trial is, that one of the witnesses on behalf of the government stood convicted of an infamous crime, of which he had not been pardoned, and that thereby he was rendered incompetent as a witness. Waiving for the present the effect of this conviction, as having taken place under another jurisdiction, we will inquire whether, supposing the conviction to have taken place in any of the courts of this Commonwealth, having jurisdiction of the offence, or even in this court, it would be a sufficient ground to entitle the prisoner, as matter of right to a new trial. The objection was not made at the trial. It could not have been made at that time; for the fact was probably not then known to the prisoner, certainly not to his counsel. It is very clear that the conviction of an infamous crime, and judgment pursuant to it, destroys the competency of the party as a witness. But it is equally clear, that whenever that objection is made to a witness, it must be supported by the record of the conviction and judgment. These must be produced and offered when the witness is about to be sworn, or at furthest in the course of the trial. If that opportunity is omitted, it is no legal cause for setting aside a verdict, that such witness has testified in the cause. All the books which treat of this subject, are positive and express in the declaration, that the party objecting must be prepared with the record; and as some of them express it, come with it

in his hand, or he shall not be heard against the competency of the witness. This rule is strict, and it ought to be so; for if any thing short of a record should be admitted to impeach the competency of a witness, it would be easy for parties accused to protect themselves from punishment; and it would be, in most cases, impossible for the witness attacked, without previous notice, to defend his reputation. Not only must infamy be proved by record, but the objection *shall not be heard* without a record. For otherwise the witness might be disqualified without cause; and no man ought to be allowed to charge another with an infamous crime, and thereby deprive him of his standing in court as a witness, without being ready to support the charge by evidence which cannot be impugned. If the suspected witness may himself be inquired of, whether he has been convicted, or if other evidence than the record may be given, it is only to affect his credibility, and he may contradict the evidence by testimony in favor of his character.

It being the rule then, that objections to the competency of a witness, founded on conviction of crime, must be made at the trial, and when the witness is offered to be sworn; it follows that, because a witness was sworn in the cause, who is since found to have been so convicted, the trial was not for that cause erroneous or irregular; and a new trial on that account, cannot be demanded as a right. Whether this fact furnishes a sufficient ground for the discretion of the court to grant a new trial, depends upon other circumstances, which will hereafter be stated. The trial cannot be impeached because a witness, against whom there was no legal objection at the time, is afterwards discovered to have been liable to an exception, which, if known, would have excluded his testimony. It is a rule in civil as well as criminal actions, that objections to witnesses, on the ground of interest or infamy, must be made at the trial, and it is necessary that it should be so established, for otherwise there would be no termination to suits. Parties, knowing the facts which constitute objections, would conceal them until the trial was over, for the very purpose of having two chances of success; and it would seldom be known that they had concealed their knowledge. It must, therefore, instead of being a matter of right to have a new trial for such cause, be discretionary with the court to grant or refuse it, according to the circumstances of the case, and the purposes of substantial justice. It being then a question to be decided by the discretion of the court, whether a new trial shall be granted, it is necessary to take into view all the circumstances of the case, with as favorable a disposition to the prisoner as may be consistent with our duty to the public, and a due regard to sound principles of justice.

We are then first to consider whether, if a new trial should be

granted, it is certain the prisoner could avail himself of the conviction of Stoddard, so as to destroy his competency as a witness. We are by no means satisfied that such would be the necessary legal effect, in the courts of this Commonwealth, of such a conviction in another State.

If New York is to be considered on the footing of a foreign State, the difficulty of giving such effect to a conviction seems insuperable. The objection to the witness, on account of infamy, must be supported by a record of the judgment. What is a record of a foreign State, and how it shall be authenticated, are questions of delicacy and difficulty, which it would be almost impossible to settle in the course of a trial, which must always proceed with as little interruption and delay as possible. Whether the facts, which would be here deemed an infamous crime, are the same which constitute the like offence, in the country from which the record comes, the court would have no means of knowing with certainty. The crime of treason is known to be different in different countries; what is felony also in one country, may not be felony in another; and it is competent to the legislature of every nation to attach disabilities to the commission of offences, which by the laws of other nations may be wholly without such consequences. Thus one State may enact that the detention of another's property, after demand by the owner, shall be deemed and taken to be larceny, and punished as such; and that a general description of the offence, in the indictment, should be sufficient; so that a foreign court could never know, by inspection of a copy of a record, what were the ingredients of the crime which had been punished. So also the nonpayment of a debt may be branded with infamy by the laws of any country, and designated by some term, usually denoting the *crimen falsi*; and this class of crimes may be enlarged, so as to comprehend transactions which in other countries are considered venial, or at least not criminal. If the common law were unchangeable, the courts of countries which adopt it as part of their code, might know with certainty the nature and character of crimes; but while every country has its legislature, which has a right to alter or repeal the common law, such certainty cannot be attained. Treason, by the common law, renders the convict infamous; but many acts are made treason by positive enactments in one country, which would not be so in another. The infamy, therefore, consequent upon treason, ought not to pass beyond the country in which the crime is committed.

Another objection to receiving such evidence for such a purpose is, that a person who may have left his native country convicted of crime, however long he may have lived in his adopted country, and whatever reputation he may have acquired by a course of upright

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and honorable conduct, has no means of being restored to credit. For the pardoning power of the country, where he resides, cannot reach an offence committed without its jurisdiction. And thus it may happen, that a naturalized citizen, who, by his virtue and talents, and a long course of irreproachable conduct, may have obtained the confidence of his fellow-citizens, and even their suffrages for the most important offices, may be met in a court of justice by some obsolete record of a conviction of some crime, perhaps merely political, which may be deemed infamous in the country from which he came; and can have no power of effacing the stain, without soliciting a pardon, where he may be wholly forgotten, and where there can be no evidence of such a change of life and manners as would entitle him to the clemency of the offended power. It is these difficulties, with others which might be mentioned, which justify the principle that appears to be adopted by the English courts, and which we are disposed to think is a maxim of general law, recognized by all nations, viz: "That the penal laws of a country do not reach in their effects beyond the jurisdiction where they are established." It is so laid down by an eminent judge in the case of *Folliott v. Ogden*, 1 H. Black. 131, and in a treatise of public law by Martens the same principle is advanced in more extensive and unlimited terms. In the 24th section of his work, he says, "The criminal power being confined to the territory, no act of its authority can be exercised in foreign countries without violating their rights." In the 25th section he says: "By the same principles, a sentence, which attacks the *honor, rights* or property of a criminal, cannot extend beyond the limits of the territory of the sovereign who pronounced it. So that he who has been declared infamous in one country, is infamous in a foreign country *in fact*, but not *in law*;" which terms the author probably uses in allusion to the civil law, resembling in some degree our distinction between competency and credibility. By *infamia juris* is meant infamy established by law, as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it has not been judicially proved. "And the confiscation of his property cannot affect his property situated in a foreign country. To deprive him of his honor and property judicially there also, would be to punish him a second time for the offence." To refuse a man the right to be a witness, on account of a conviction in another country, would be to suffer that conviction to have force here, and in some measure to carry it into execution.

If it be said that it will be dangerous to the lives and reputations of the citizens that foreigners, who have been rendered infamous abroad, should be admitted to testify against them; the answer is, that their former condition and character may be made known to the

jury to enable them to judge of their credibility, and this without depriving them of any valuable personal right by reason of their conviction abroad. Their right to stand in court as *probi et legales homines* is sustained, but as all other men, the value of the testimony is to be estimated by their general reputation, and even by the proof of particular facts showing a conviction and punishment for crime, and the effect of such proof may be always rebutted by evidence of good conduct, a virtuous life, &c.

Infamy is in truth part of the punishment of the *crimen falsi*, although not expressed in the sentence; and it creates a disability to testify, just as excommunication in a spiritual court does, to sue in the courts of common law. To hold a person incompetent, on account of such a conviction, is to give effect to the conviction and to enforce the punishment, and thus the penal laws of one country would reach into others, contrary to the principle above stated. It would seem to be consistent with sound principles also, that wherever there is a crime or punishment remaining in force, there should be a power of pardon; but the act of pardon cannot operate upon an offence committed under another jurisdiction, nor can it extend beyond the jurisdiction of the offended sovereign. So that one who has once exposed himself to a punishment which renders him infamous in the country where the offence was committed, must be perpetually stigmatized, if he remove into another country. This is sufficient to show the reasonableness of limiting the penal effects of crime to the country whose laws have been violated. We do not find, after a careful examination, as well by the counsel for the prisoners as by ourselves, that the question before us has arisen in the English courts, or in those of any of the United States. All the cases in the English books, in which objections were made to the competency of witnesses on the ground of infamy, seem very clearly to have been cases of conviction in some of their own courts. Indeed the strictness of the rule, under which such evidence is admitted, seems almost necessarily to exclude convictions in any foreign court. The objector must have the record in his hands, and must show not only a conviction but a judgment thereon. We think the silence of the English books on this subject, even among the multitude of treatises on evidence, which have lately issued from the press, furnishes strong reasons to believe that objections of this nature, if heard at all, only go to the credibility of witnesses.

The only book we have seen which intimates a different doctrine, is one upon the principles of evidence, by a Mr. Glassford of Scotland, referred to in the argument for the prisoner, a respectable writer, but hitherto unknown to the courts of law in this country. Speaking of incompetency by reason of infamy, he inquires into the proof neces-

sary to establish the fact, and supposes that an exemplification of a record from England or Ireland would be received as proof in Scotland. How far the peculiar organization of the Scotch courts, and the system of rules by which they are governed, may have had an effect on their law of evidence, we cannot know; nor whether the circumstance that the three countries are under one sovereign and one legislative power, may not have had its effects. The examples produced by the writer, are from England and Ireland only; and from this it would seem that his doctrine would not apply to the records of a country strictly foreign. Indeed, such records cannot properly be exemplified; but must be proved by testimony, as other facts are proved.

But it has been argued by the counsel for the prisoner, that although a conviction in a court of a country strictly foreign should not be held to take away the competency of a witness, yet that such is the relation of the several States which compose the American Union with each other, that the same law ought not to prevail here, as the States are not in fact foreign to each other. If this position is true, it must result from the Constitution of the United States only; for without that, the several States were entirely independent of each other, and as completely foreign one to the other, except so far as temporary confederacies may have united them, as any separate European governments. Whatever change exists in this relation, must be sought for in the Constitution of the United States, and the laws of Congress made pursuant thereto. The provision of that Constitution is, that "full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State, and that Congress may, by general laws, prescribe the manner, in which such acts, records and proceedings shall be proved, and the effect thereof." By this provision, separate from any act of Congress pursuant to the authority therein given to that body, nothing more is established than that public acts, records and judicial proceedings, when duly authenticated in the manner which Congress should afterwards prescribe, should be received as conclusive evidence of the facts they were intended to establish in all the courts of the Union, leaving to those courts the power of giving such effect to records so authenticated as the laws by which they were governed should require; and this effect might be different in different States, according as their own local rules, or the principles of the common law should prevail with them. But it was desirable that uniformity upon so important a subject should exist, and therefore the power was given to Congress to declare, by general laws, the effect of such records.

The Act of Congress which was passed soon after the organization

of the government under the Constitution, viz., in the year 1790, in execution of this power, unhappily is not expressed in such terms, as to remove all doubt, as to the effect of judgments in States, other than those in which they were rendered. This act, after providing the manner in which records shall be authenticated, declares that they shall have the same faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the State, from whence the said records shall be taken. If there is any difference between the faith and credit given to a record of a judgment, and the effect of such judgment; it would not seem that Congress, by this act, had done any thing more than was previously provided in the Constitution, except as to the mode of authentication. For by the Constitution itself full faith and credit must be given; and that could not be, unless it had the same faith and credit in another State, which it would have in the State from whence it was taken. That there is an essential difference between *faith and credit*, and *effect*, would seem to follow from the different application of the terms, as used in the Constitution. That instrument itself establishes the faith and credit of records; but their effect is left unprovided for, except in the power given to Congress to legislate on the subject. Courts in the different States, and judges in the same State, have varied in their construction of the Constitution, and of the act of Congress upon this subject; some holding that the effect, by which they mean the legal import and obligation of judgments of another State, is still left open to be decided by the common law; others that the terms "faith and credit," as used in the act of Congress, mean the same thing as the term "effect," and that this effect being the same in the State where they are used, as in the State from whence they come, they are in all respects like domestic judgments, as to their conclusiveness against the party who is the subject of them.

In this Commonwealth the construction of the Constitution, and of the act of Congress, must be considered as definitively settled in the case of *Bissell v. Briggs*, 9 Mass. Rep. 462. The decision in that case is, that judgments rendered in other States are not merely foreign judgments, liable to inquiry into their merits, being only *prima facie* evidence of debt; nor entirely domestic, so as to preclude any inquiry into the jurisdiction of the courts in which they are rendered, but that if the court had jurisdiction, they are to all intents and purposes as effectual and uncontrollable as judgments rendered in our own courts. It would seem by the opinion of Chief Justice Parsons delivered in that case, that the jurisdiction of the court may be inquired into as a matter of fact, on a plea of *nil debet*; and that, if

the want of jurisdiction should be established by the defendant, he will prevail on that issue.

The Supreme Court of the United States have carried the sanctity of judgments still further, having in the two cases of *Miles v. Durfee*, 7 Cranch, 481, and *Hampden v. McConnel*, 3 Wheaton, 234, decided that *nil debet* is not a good plea to an action upon a judgment of another State; and indeed that no plea would be good, except such as would be allowed in the courts of the State, in which the judgment was rendered, thus establishing an identity in operation and effect between judgments rendered in the courts of the same State and in those of other States. Over a question of this nature, the construction of the constitution and laws of the United States, that court has the final and conclusive authority, so that their decision must be taken to be the law of the land. There can be therefore, while these decisions stand, no further doubt as to the effect of the judgments of the courts of one State in those of another.

Then comes the question of the application of this principle to the case now before us. Does the conviction of an infamous offence, proved by the copy of a record of a court of competent authority in the State of New York, render the subject of such conviction incompetent as a witness in the courts of this State? — We do not think that this follows from any principles yet established; for there is a manifest distinction between the judgments of another State in civil actions affecting property only, and judgments on criminal prosecutions, and there is reason to believe that the provision in the Constitution had respect to the former only. It must be supposed that when the people declared in the Constitution, that full faith and credit should be given to the judgments of each State respectively, they must have intended such judgments, as could by the aid of courts of States, other than those in which they were rendered, be carried into execution and effect, as may be done with respect to judgments in all civil actions. But it is manifest that a judgment on a criminal prosecution cannot be carried into effect, beyond the jurisdiction of the State, within which the offence was committed; or, if this might be done by virtue of any act of Congress founded upon such a construction of the constitutional provision, it is clear that such power has never been challenged; and it is hardly possible to conceive that such a construction will ever be adopted, so long as any portion of sovereignty remains with the States. For the right and duty of punishing offences must necessarily be limited to the authorities, against which the offences have been committed. Indeed, the provision in the second section of the fourth article of the Constitution of the United States is wholly inconsistent with the supposition of such a power.

That section provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State *having jurisdiction of the crime.*" This is a perfect recognition of the independent sovereignty of the States in regard to crimes committed within their territory, as well as of the local nature of crimes and punishments. If the faith and credit to be given to judicial proceedings, relates to criminal as well as civil judgments; and that faith and credit, according to the act of Congress, as construed by the Supreme Court of the United States, means that the judgment shall have the same effect in the State in which it is produced, as in that in which it was rendered, it would follow that an unexecuted sentence in one State might be executed in another, which never was intended. On the contrary, the Constitution has merely made that obligatory between the States, which between nations entirely foreign to each other was done from comity, viz., the delivering up of criminals who have fled from justice.

I think this proves satisfactorily, that the clause in the Constitution of the United States, relating to the faith and credit to be given to judgments has no effect whatever on judgments upon criminal suits; and that, in this respect, the relation of the States to each other is left wholly unaffected by the Constitution.

This will readily be admitted in regard to any direct effect of such judgments upon the persons of such fugitives as may be found within our territory. No one supposes that they can be proceeded against and punished, either in their persons or property, in virtue of any judgment which may stand against them in the State from which they fled. Why then should they be collaterally affected by the consequences of any such judgment? A disparagement of character, and incompetency to testify, are a part of the punishment of crime, either at the common law or by statute. If the penalty do not extend beyond the jurisdiction against which the crime was committed; then incompetency, which is the effect and consequence of crime, and part of the penalty, cannot reach beyond the limits of the State whose laws have been violated.

It has, however, been said, that it is the infamy which takes away the right to testify; and that the fact of infamy being proved by the record of the conviction and judgment is incontrovertibly established, and therefore incompetency must follow. But if, by the Constitution of the United States, the faith and credit to be given to a record of a judgment of another State, has no relation to criminal proceedings; then it has been shown, I think, that such record cannot be received to exclude a witness. If it should be provided by the laws of New

York, that a person convicted of bribery at an election should be disfranchised, and one thus convicted should remove into this State, and reside here the term provided in our Constitution to make him an elector, could he be deprived of this privilege on account of such conviction? Certainly not; because the penal laws of one State do not extend into any other, and yet, if such conviction had the same effect here as in New York, such would be the consequence. For the foregoing reasons, and others which it would require too much time to enumerate, we have come to the opinion that there is no difference in the effect of a conviction, in regard to the competency of a witness, between any State in this Union and any foreign State; and that in neither case is the witness to be excluded on account of such conviction. Whether such conviction could be offered to the jury, for them to weigh against the credit of the witness, is a different question, which need not be decided now, for we are all clearly of opinion, for the reasons which will be now stated, that, if the only effect of the conviction would be to impeach the credibility of the witness, it is no sufficient ground for a new trial.

Proceeding upon the ground that the witness would have been permitted to testify, had the fact since discovered been known and presented to the court at the time of the trial; and that, if the law were otherwise, there would be no right to a new trial, because there was no error or irregularity in the course of the trial; it has come to a question of discretion with the court, whether a new trial shall be allowed, because the evidence now obtained might affect the credibility of this witness, and by possibility might have occasioned doubts in the minds of the jurors, sufficient to have produced an acquittal. Certainly, cases may arise when the exercise of this power in the court would be salutary and wise; but every case of discretion must depend upon its circumstances and be judged of with due regard to the rights of the public, as well as the interest of the prisoner. In cases which affect life, duty as well as inclination would insure the most favorable consideration of all circumstances which might have a tendency to protect innocence from punishment, and even to extend to the guilty all the legal advantages of a trial. But when there has been a trial, which the court are satisfied was fair and impartial, and in which all the legal rights of the party accused were observed, and a new trial is sought for, the court are bound to look into the evidence upon which the verdict was founded, in order that they may ascertain whether the cause suggested in support of the motion is such as would or ought to produce a different result in the minds of another intelligent jury. It is true, it cannot be known what effect may be produced upon other men's minds, by any specific kind or degree of evidence, and with that, in the course of the trial, the

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court have no concern; but on a motion to their discretion, they must necessarily revise the evidence, and must judge for themselves of the probable bearing of the circumstances relied on to support the motion.

Having decided that to grant new trials in capital cases is within the power of the court; that the exercise of this power, where there has been no error on the trial is discretionary; if every suggestion should be listened to without regard to the merits of the case, or the just bearing of the fact suggested, it is certain that the course of public justice would be much obstructed; and that the punishment of crimes would often be evaded. It is a power to be used sparingly for the protection of innocence, not to screen the guilty. Now, in the case before us, the only advantage the prisoner would have on another trial, which he had not before, would be to show that Stoddard, one of the witnesses who testified against him, was not deserving of credit, because he had been convicted of larceny in New York. If this witness had gone to the jury wholly unimpeached, and his testimony had been material and uncorroborated, the case would be a strong one for the exercise of the discretion of the court, in granting another trial. But this witness was impeached at the trial by the evidence of two convictions of larceny within the Commonwealth; and it was known to the jury that he had but just left the public prison, under a pardon granted by the executive, for the sole purpose of rendering him a competent witness. Surely evidence of another conviction of a similar offence in another State, of which he had not been pardoned, would have added nothing to the weight of evidence against his credibility. He was considered as a degraded person, both by the court and jury; and in the charge to the latter by the court, they were expressly told that, unless they found his testimony corroborated by unimpeached witnesses, he ought not to be believed. The same observations applied to another witness who appeared under similar circumstances. In the opinion of the court there was sufficient evidence to justify the verdict without the testimony of either of those men. An insurrection had taken place among the prisoners. The man with whose murder the prisoner is charged, was found beaten and mangled in a cruel manner. The prisoner, was seen, with many other convicts, rushing from the place where the murdered man lay, in pursuit of another victim, who was seized by the prisoner, and in danger also of being murdered had he not been rescued by the officers of the prison. The prisoner, and one other convict who was tried with him, was armed with a club or bar of iron. The prisoner uttered expressions indicative of the deed which had been done, and of his intentions to wreak his vengeance upon others. These facts were proved by respectable officers of the prison,

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and were uncontradicted. Had there been no other evidence, any firm and intelligent jury would have found the prisoner guilty. In addition to this, the two pardoned convicts swore positively to the blows having been given by the prisoner, which caused the death of the murdered man. Both these last witnesses were impeached, as to their credibility by their convictions. Now we cannot believe that had the jury known of the conviction of Stoddard in New York, that fact would have weighed a feather in estimating his testimony. Neither can we believe that another jury, acting upon fair principles, would be differently affected by the fact.

Under these circumstances, to grant a new trial would be only to prolong the suspense, and increase the anxiety of the prisoner, without any final advantage to him; and we do not feel authorized to surrender the principles of justice to feelings of compassion or sympathy.

Motion overruled.

It was undoubtedly the ancient common-law rule, that a defendant convicted of a *felony* could not for any cause obtain a new trial; the sole remedy being to apply for a pardon, if for any cause the conviction was so improper as to justify it. *Rex v. Mawbey*, 6 Term, 638, Dictum of Ld. Kenyon; *Rex v. Inhabitants of Oxfordshire*, 13 East, 416, note; 1 Chitty, Crim. Law, 654; 2 Russell on Crimes, 589. But in *misdemeanors* it was different. *Rex v. Read*, 1 Levins, 9, (1660); *Rex v. Smith*, T. Jones, 163, (1681); *Rex v. Simons*, 19 How. St. Tr. 680, (1754); *Rex v. Mawbey*, 6 Term, 619, (1796); *Regina v. Whitehouse*, 18 Eng. Law & Eq. R. 105, (1853.) And this is another reason why there should be a clear and well-defined distinction between those two classes of offences. Although this distinction seems firmly grafted into the English common law, yet in America, with one or two exceptions, it has never been recognized. It is true that in *The People v. Comstock*, 8 Wendell, 549, (1832,) it was said to be "perfectly settled that in offences greater than misdemeanors, a new trial cannot be granted on the merits, even when the prisoner has been convicted," and the English authorities before cited were quoted and approved. This was, however, but a *dictum*, as the application was for a new trial after *acquittal*. Judge Story, however, in 1834, threw the whole

weight of learning, ability and experience into the same scale, in the case of *The United States v. Gibert*, 2 Sumner, 19. The prisoners had been convicted of robbery on the high seas, and made a motion for a new trial for divers reasons there set forth, and after a very elaborate and critical examination of the authorities, English and American, on this point, that distinguished judge said, "Upon the whole, having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction." This remarkable result was professedly deduced both from the principles of the common law and from that provision of the Constitution of the United States which declares that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb." "If this clause," said that eminent jurist, "does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial whether the verdict is of acquittal or conviction, and the same party may, in the discretion of the court, be put upon his trial, ten, nay, twenty times, if the court should deem it fit. It was, (as I think,) among other things, to get rid of the terrible prece-

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dents on this subject alluded to by Lord Hale, and even acted upon by him, in the reign of Charles II., in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was engrafted into the Constitution. That Constitution has also, in another clause, declared that "no fact once tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rule of the common law." The only modes of making this re-examination known to the common law, are by a writ of error, and a new trial, and if by the common law there cannot be a new trial in a capital case after a regular trial once had upon a good indictment, as seems to me to be conclusively established by the English authorities already cited, then this claim also carries in its bosom another virtual prohibition. It has been supposed that in all cases of conviction there may be ground to grant a new trial, because it will always be in favor of the prisoner. If this were true, the difficulty would still remain that that clause of the Constitution forbidding a person to be put in jeopardy, does not provide for a new trial only where it is favorable to the prisoner. Cases of conviction may readily be conceived, in which a new trial may be injurious to the prisoner. Suppose a man indicted for murder and convicted of manslaughter; can a new trial be granted at all, unless by putting him twice in jeopardy of his life? Suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offence,) and there is a conviction of the robbery without such aggravated circumstances, can a new trial be granted upon the application of the government or of the prisoner?"

It was thus that the constitutional argument was put by the learned judge, but he also argued that by the authorities at common law, the same result would be attained. But the position that the power to grant new trials was not then determined by the adjudged cases is not the least remarkable position of this opinion; for the instances were then numerous in

which new trials *had been* granted to prisoners after their conviction; many of them being cases of murder, or other capital felonies. Some of these are cited below, and in some the power of the court to grant new trials was deliberately argued and expressly asserted. See *The State v. Hopkins*, 1 Bay, 372, (1794); *The State v. Greenwood*, 1 Haywood, 141, (1795); *The United States v. Fries*, 3 Dallas, 515, (1799); *The People v. Townshend*, 1 Johns. Cas. 104, (1799); *The State v. Aaron*, 1 Southard, 231, (1818); *The State v. Crawford*, 2 Yerger, 66, (1821); *The Commonwealth v. Green*, *supra*, (1822); *The State v. Parker*, 1 Halsted, 148, (1822); *Jerry v. The State*, 1 Blackford, 395, (1825); *The State v. Merrill*, 2 Devereux, 259, (1829); *The State v. Sims*, 2 Bailey, 29, (1830); *The People v. Stone*, 5 Wendell, 39, (1830,) a case of perjury, where the subject was carefully examined; *The State v. Lipsey*, 3 Devereux, 485, (1832). And although Judge Story says in *Gibert's case* that his opinion was formed "after the most mature deliberation," yet we find him saying in the very same volume, in the subsequent case of *The United States v. Battiste*, 2 Sumner, 244, (1835,) that "if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require." A valuable remedy, certainly, if the court "had no power" to grant it!

The chief argument of Judge Story seems to be that if a new trial should be granted, the prisoner *might* be subject to the injustice and hardship of a second trial, and he proposes to avoid that by denying him any escape from the *certain* hardship and injustice of the first trial. As might be expected, such reasoning never found favor in other tribunals, and the doctrine is now *perfectly well settled*, that courts have power to grant a new trial after conviction, for good cause shown, both in felonies and misdemeanors. See *Ball v. The Commonwealth*, 8 Leigh, 726, (1837,) where the subject was ably examined by Fry, J., and the case de-

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serves the attention of the learned reader. See also *The United States v. Keen*, 1 McLean, 429, (1839); *The United States v. Connor*, 3 McLean, 573, (1845); *The United States v. Harding*, 1 Wallace, Jr. 127, (1846); *Grayson v. The Commonwealth*, 6 Grattan, 712, (1849); *Sutcliffe v. The State*, 18 Ohio, 469, (1849); *The State v. Prescott*, 7 New Hampshire, 287; *The State v. Slack*, 6 Alabama, 676, (1844); *Weinzorpflin v. The State*, 7 Blackford, 186, (1844). In this case, Dewey, J., said: "Before considering the motion for a new trial, we wish to advert to a decision made by a very eminent judge, whose opinions we regard, in the general, as safe guides for other courts, but with whose conclusion on the subject of the right of courts to grant new trials, in cases of convictions of capital crimes, we cannot agree. We allude to the case of *The United States v. Gibert et al.* 2 Sumner, 19. The principle there attempted to be established is, that the clause of the Constitution of the United States, which protects an accused person from being twice put in jeopardy of life or limb for the same offence, is a prohibition against granting him a new trial, after a conviction of a capital crime on a valid indictment, and by a regular jury. And the judge assumes that the maxim of the common law, from which the constitutional provision is borrowed, is also a similar prohibition, and furnishes the ground on which the English courts have, of late years, refused new trials in capital cases. Directly opposed to this decision is the later case of *The United States v. Keen*, 1 McLean, 429; and with that we concur. Among various decisions reviewed and disapproved of by the distinguished judge alluded to, is that of *Jerry v. The State*, *supra*. Had the court which decided that case, adopted the same train of reasoning which convinced the learned judge, they must have come to the conclusion that the courts of this State cannot grant new trials even on convictions for misdemeanors. For if it be true, that the protecting clause in the Constitution of the United States, and the original maxim of the common law, amount to positive

prohibitions against releasing a person convicted of felony by a new trial, the corresponding clause in our Constitution, which embraces all offences, would be a similar prohibition in all criminal cases whatever. And thus our citizens would be deprived of a privilege which all concede the common law allows; and deprived, too, by a provision designed, as we believe, for their protection. The Supreme Judicial Court of Massachusetts, in the case of *The Commonwealth v. Green*, 17 Mass. R. 515, used the following language: 'It appears by the English text books, and by several decisions cited in support of the position, that in cases of felony a new trial is not usually allowed by the courts of that country. But whatever reasons may exist in that country for this practice, we are unable to discern any sufficient ground for adopting it here.' In commenting on this passage, the judge says, 'Now with the greatest deference for that learned judge (Ch. J. Parker, who delivered the opinion of the court) I cannot admit that this language truly represents the state of the English common-law doctrine on this subject. On the contrary, as I understand that doctrine, it is no matter of *practice* at all (usual or unusual) in respect to which the English courts are at liberty to exercise any discretion, but it is a matter of power which a fundamental maxim of the common law prohibits the courts from exercising.' We may be wrong, but we had thought that the whole doctrine of granting new trials in all cases, civil and criminal, had its origin merely in the *practice* of the courts, as a substitute for the inadequate remedy afforded by the old writ of attain, which lay at the suit of the king, and not at the instance of the party aggrieved. 3 Blackstone, Comm. 404; 4 id. 361. And there is reason to believe that, formerly, the English courts were in the *practice* of granting new trials in felonies as well as misdemeanors. In the case of *Rex v. Read*, 1 Lev. 9, the majority of the Court of King's Bench held this language: 'New trials may be in criminal cases at the prayer of the defendant, where he is convicted, but

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not at the suit of the king where he is acquitted, no more in criminal cases than in capital.' And in the case of *Rex v. Fenwicke & Holt*, Ib., Kelynge, J., said, 'No case could be shown of a new trial in a criminal case more than in a capital.' In the same case, the court, speaking of granting new trials, declared that 'the course of the court was the law of the court.' These cases, it is true, were not in felonies, but they show the opinion of the judges of the day, that new trials were sometimes granted in capital cases, and that the granting of them were matters of practice. Nor were the new trials here spoken of on account of a mistrial, but where the verdict was against evidence. Viner, in his Abr., title Trial, Q, g, says, 'A new trial will not be granted where the defendant is acquitted in criminal and capital cases, but otherwise where he is convicted.' Blackstone writes thus: 'In many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench; for in such case, as hath been said, it cannot be set right by attain.' 4 Comm. 361. Both Viner and Blackstone cite *Rex v. Read*; and if that case does not furnish the 'instance' of a new trial actually granted in a capital case, it sanctions the doctrine laid down by those authors. We are aware that at length, in 1781, the Court of King's Bench decided that new trials could not be granted in capital cases. 13 East, 416, note b. But that the decision turned upon the maxim, that a man should not be put twice in jeopardy of life or limb for the same offence, we are nowhere informed but in the case of *The United States v. Gibert et al.* And we cannot but think such a principle of decision would have been a perversion of the maxim."

This unanimity of authority has seldom been broken in upon, and *Gibert's case* has very generally been disapproved. It is true that in a recent case, *The People v. The Judges of Oyer and Terminer*, 2 Barbour, 282, (1847,) the Supreme Court of New York, led astray in part by the English rule about new trials, sanctioned

as it was in *The People v. Comstock*, 8 Wendell, 549, did decide, contrary to *The People v. Stone*, 5 Wendell, 39, that Courts of Oyer and Terminer could not grant a new trial on the merits after a conviction, because it was not a court of superior general jurisdiction. But this decision was hardly published before it was itself overruled by *The People v. Morrison*, 1 Parker, 625, (1854,) in which the whole subject was thoroughly examined, and after a review and citation of numerous adjudged cases on the subject, Harris, J., says: "Thus it appears that in eighteen States the power to grant new trials is asserted and maintained, and there is no reason to believe that this singular uniformity of decision and practice has been departed from in a single instance in any other State."

The other point decided in *Green's case*, that a conviction of a person in one State or country of an infamous crime will not render such person an incompetent witness in another State, seems to have received the sanction of Judge Story, (Conflict of Laws, § 91,) and of Professor Greenleaf, (1 Greenleaf's Evidence, § 276); but a different result was attained in *The State v. Chandler*, 3 Hawks, 393, where the question was much considered by the Supreme Court of North Carolina in 1824. And the latter view was adopted in *Chase v. Blodgett*, 10 New Hampshire, 22, (1838.) Parker, C. J., there said: "The conviction in this case was in another of the United States; and although such State is to be regarded as foreign, for some purposes, it is not foreign so far as the proof of its judicial proceedings is concerned. The Constitution of the United States provides, that full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State; and that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. The act of Congress of May 26, 1790, prescribes the manner of proof. But we are not disposed to place our decision upon the ground, that by force of these provisions the record of the con-

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viction must exclude the witness here, because it would have that effect in Massachusetts. If it be admitted that the constitutional provision relates to the credit and effect which the judicial proceedings of one State are to have in another, when offered as the foundation of an action, or as a justification for acts done, or as evidence of rights existing—still, as those proceedings may, by the laws of the United States, be so authenticated as to be here conclusive evidence of the rendition of the judgment, and of the matter upon which it is founded—the inquiry remains, whether a conviction in another of the United States, of a crime infamous by the laws of that State, and equally so by the laws of this State, should not operate to exclude the criminal from being heard as a witness here, in the same manner as it would have done if the conviction had taken place in this State. The principal argument in *The Commonwealth v. Green*, against admitting the record, to exclude the witness, is, that ‘a disparagement of character, and incompetency to testify, are part of the punishment of crime, either at common law or by statute;’ and that to hold a person incompetent, on account of such conviction, is to give effect to it, and to enforce the punishment; by which means the penal laws of one country would reach into others. ‘If the penalty,’ it is said, ‘do not extend beyond the jurisdiction against which the crime was committed, then incompetency, which is the effect and consequence of crime, and part of the penalty, cannot reach beyond the limits of the State whose laws have been violated.’ 17 Massachusetts, R. 548. If this is a correct exposition of the matter, the question might well be asked, whether the admission of the record, in disparagement of the character of the witness, and for the purpose of affecting his credibility, is not enforcing a part of the punishment; and thus carrying into effect to some extent, the penal laws of another country. Regarded in that light, the disparagement of character would be only a less punishment than exclusion on account of infamy of character. But the inquiry arises at once, whether

the rejection of a witness, because he has been convicted of an infamous crime, is, in truth, any part of the punishment of the crime. The punishment of the crime is prescribed by the law, and is inflicted in pursuance of the sentence. The judgment of the law, as made up in the record of the sentence, shows the penalty and punishment. But incapacity as a witness, where the incapacity results from the common law, forms no part of the sentence. It is not a penalty prescribed for the punishment of the crime, and is not adverted to in the judgment, or found in the record. A rejection, when offered as a witness, may, it is very true, cause greater mental suffering to the party than all the punishment denounced in the statute, or ordered in the judgment; but this suffering is incidental. It is not inflicted as the judgment of the court in which the conviction was had, or of that which rejects the witness. The witness is excluded, not to punish him for the crime he has committed, but because, by the commission of it, he has shown himself a person unfit to be trusted to give testimony affecting the rights of others, (2 Starkie’s Ev. 714); and the exclusion, it seems to us, is no more to be regarded as a punishment of the individual, than the exclusion of a person on account of his disbelief in the existence of a Supreme Being is to be regarded as a punishment of his atheism. The rejection is for the protection of the rights of the party against whom he is called to testify. On this view, if faith and credit is given to the matter appearing by the judgment, and it is there shown that the witness has been convicted, in another State, of a crime infamous by the laws of that State, and one which, if committed here, would have excluded him from testifying; it may well be asked—How much more fit is he to be heard, than he would have been had the conviction been in our own courts? How much greater is the probability that his statements will bear the impress of truth? How much safer are the rights of the party? It is suggested in *The Commonwealth v. Green*, that the clause in the Constitution must have intended such

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judgments as could, by the aid of courts of other States, be carried into execution and effect; and that it has no relation to criminal proceedings. It is perhaps unimportant to the settlement of this case; but we are of opinion that this would be too narrow a construction. It was doubtless not intended to require the courts of one State to enforce the sentences of those of another against criminals. The punishment of crime is to be inflicted in the jurisdiction in which it is committed; and the judgment of a court of one State, against an offender, cannot have such faith and credit as to form the basis of a new indictment, in another State, or of an order for carrying the judgment into effect there. But the criminal proceedings in one State may, in many instances, form the only justification for acts which would otherwise be trespasses of an aggravated character; and when so offered, in the courts of another State, they are entitled to as much faith and credit, and are as much within the Constitution and the act of Congress, as any other judicial proceedings. And so of any other cases where such proceedings may lawfully be offered in evidence in a foreign government, or another State. There is nothing in the terms of the Constitution, or law, to lead us to a different conclusion. Another argument against the admission of the conviction, to exclude the witness, urged in the case before alluded to, is that where there is a crime, or punishment, remaining in force, there should be a power of pardon. There are, undoubtedly, cases where the individual who has been convicted of an infamous crime, gives evidence, by an exemplary life, of penitence and reformation; and there may be cases in which the testimony of such an individual may be of great importance to some party, in a court of justice. But the power of pardon exists in the government where the crime was committed, and the evidence of reformation can be offered to the executive there, in all such cases, and the individual be restored to his competency. It may not be quite so convenient to procure a pardon, as if he had remained within the jurisdiction where the judgment

was rendered; but there should be no well founded apprehension, in such case, of a refusal, because the party had removed from the State. On the other hand, if a party, thus convicted, may relieve himself from the disability, by emigration to another State, he has an encouragement to change his domicile, although he may not have a disposition to change his habits. It is unnecessary to pursue this discussion further. For the reasons already indicated, we are of opinion that a conviction in another State, of a crime which by the laws of that State disqualifies the party from being heard as a witness, and which if committed here, would have operated as a disqualification, is sufficient to exclude him from testifying here, in the same manner as if it had been committed, and the conviction had taken place, in this jurisdiction. We go no further than that at the present time; leaving cases which do not come within this principle for future consideration. 2 Starkie, Ev. 716, note 2; 17 Massachusetts R. 528, 543; 2 Harris & McHenry R. 380; *Clark's Lessee v. Hall*."

There are some intimations in *Green's case* that the conviction of a witness in a foreign tribunal, though not competent to exclude a witness, may yet be offered to affect his *credibility*. And this rule was expressly adapted in the subsequent case of *The Commonwealth v. Knapp*, 9 Pickering, 512. See *The State v. March*, 1 Jones, (N. C.) 526, (1854.)

But even this use of a foreign conviction has been elsewhere denied. *Upp v. The Commonwealth*, 6 Grattan, 706, (1849); *Chase v. Blodgett*, 10 New Hampshire, 22. And the Court there observed, "The admissibility of a conviction in another government, to exclude a witness from testifying, was discussed very much at large in *The Commonwealth v. Green*, 17 Massachusetts R. 515, in which the court came to the conclusion that a conviction of an infamous crime, in a foreign government, and even in another of the United States, was not sufficient to exclude the witness. It does not seem to have been settled, in that case, that it could be admitted to affect his credibility;

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but some intimations that such might be its effect are contained in the opinion; and in a subsequent case, *The Commonwealth v. Knapp*, 9 Pickering, R. 512, a record of conviction, in another State, was held clearly admissible to affect the witness's credibility. It is always with great reluctance when we differ from the learned tribunal whose opinions have just been cited; but our investigations in this case, have not led us to a similar conclusion. Aside from these cases, we are not aware of any decision which will justify the introduction of such evidence for the purpose of impeaching the credibility of a witness. Mr. Phillips, in his treatise on Evidence, speaking of the effect of a pardon, says, 'It is said to make the witness a new creature, and gives him a new capacity; the crime, indeed, may still be objected against him as affecting his credit, but cannot be urged against his competency as a witness.' 1 Phillip's Ev. 27, [29.] No authority is cited for that part of the paragraph relating to the credit of the witness; but, in the sense in which the matter was probably intended, there is, perhaps, no reason to deny the correctness of the position. The author is not, in that place, treating of the purpose for which a record of the conviction of the witness, for an infamous crime, may be offered. He had before stated, that it might be offered to show that he was incompetent to testify, and is there considering the restoration of his competency. This is effected by a pardon; but the pardon does not prevent the other party from offering the record of the conviction, for the purpose of excluding the witness. It is produced in answer to that evidence, and obviates its effect, so far as to admit the witness to testify; but the record of the conviction having lawfully come into the case, under the attempt to exclude him, if it was read in the hearing of the jury, might naturally be expected to have some effect upon the character of the witness, and may, perhaps, without any violation of rules, form a subject of comment in that view. This, however, is not clear, as the evidence of the conviction, when offered to exclude, is addressed to the court, and

not to the jury. It is not unusual that matters come into a case calculated to affect the credit of a particular witness, and which are urged upon the attention of the court and jury for that purpose, but which could not have been offered, standing alone, as substantive testimony to impeach his character. That the record of a conviction cannot be offered with the avowed purpose of impeaching the credit of a witness, where the conviction was within the same government, seems to be evident. So far as our examination has extended, no elementary writer, in treating of the effect of such conviction and the admissibility of the record, has suggested that the party, against whom the witness is produced, has an election to treat the conviction as a ground of exclusion, or as an impeachment of the credit of the witness; nor has any case been found which sustains such a position. On the contrary, the conviction, with the exception of the cases in Massachusetts, where the convictions were in other States, has been treated as an objection to the competency of the witness alone. The record of the conviction is to be offered before the witness is heard. The record of the conviction is but evidence of the commission of a particular crime; and the authorities are express, that the character of a witness for truth can be impeached by general evidence only, and not by evidence as to particular facts. 3 Starkie's Ev. 1753; 1 Ib. 146; *Sharp v. Scoging*, Holt's N. P. C. 541; 1 Phillip's Ev. 212, [229]; Comyns's Digest, Test. A. 4. The record furnishes evidence, of the highest nature, of the fact that the witness committed the crime; but it is no more than conclusive evidence, as to particular facts, and seems, therefore, to come within the principle just stated.—The credit of a witness may be impeached by his cross-examination; or by evidence of his general bad character; or by testimony that he has said or done that which is inconsistent with his evidence on the trial; or by contrary evidence as to the facts to which he testifies. 1 Starkie's Ev. 145; 1 Phillip's Ev. 212, [230.] Such seems to be the rule as stated by the text-writers,

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and established by the cases; but this certainly does not recognize the admission of his conviction as one means of attacking his credibility.—It is perfectly clear, that any evidence to show that the witness had committed a crime, unless it be that of a record of conviction, is inadmissible to affect his credit. The witness cannot be compelled to disclose, either that he has been guilty of a crime, or has been convicted of the perpetration of one; nor can witnesses be offered to establish such a fact. 1 Phillip's Ev. 205, [222]; 1 Starkie's Ev. 137, 138, and note 1.—A party may object to a witness, that he disbelieves the existence of a Supreme Being, for the purpose of excluding the witness from testifying; but no authority has been found which shows that he may waive his right to offer the proof in exclusion of the witness, and afterwards prove that 'particular fact' to impeach his credibility. He may forego his right to exclude, if he pleases; but if he does not object to the witness when he might have excluded him, he voluntarily admits him as worthy of being heard; and ought not to be permitted to attack his character by proof of a particular fact, affecting the witness, but having of itself no connection with the cause. If the evidence of a particular fact, affecting the general character of the witness, was to be admitted to impeach his credit, the particular circumstances under which that fact happened, ought, in justice to the witness, to be inquired into, in order to the formation of a judgment how far it should detract from his testimony; and so, if a judgment of conviction was admitted, to affect his credit merely, it should affect it more or less, according to the circumstances under which the crime was committed; and the party offering the witness ought to be permitted to give evidence of those circumstances.—It is from these considerations that we have come to the conclusion, that a domestic judgment against the witness could not be used as evidence to the jury, for the purpose of establishing the particular fact that he had committed the crime, and thereby impeaching his

general credit. And there is nothing in the cases cited from Massachusetts to indicate that, thus far, there is any different opinion entertained there.—Evidence of the conviction of a witness, when offered for the purpose of excluding his testimony, is, as has been before suggested, addressed to the court. If it may be offered to affect the credit of the witness, its nature will be changed, as it will thus become evidence to the jury.—Upon what ground, then, is a judgment of another State, if it be admissible at all, to be admitted for this half way purpose? We obtain no answer to this question from the cases which have been cited. In *The Commonwealth v. Knapp*, in which it was so held, no grounds for the opinion are reported. It is not, certainly, because it is permitted to have no greater effect in the State where it was rendered. There its effect would be exclusion. Nor can it be because a crime committed in another State is somewhat less infamous than a like crime committed in our own, and should therefore not entirely exclude the witness, but only affect his credibility. The declared disbelief of the existence of the Deity would not be reduced down to evidence affecting only the credit of the witness, because the declaration of unbelief was made within another jurisdiction. Nor can it be because the judicial proceedings in another State, although proper to be offered in evidence, are, to have a little less weight than those of our own. If the judgment is to have any effect, it would seem that, when proved, it should be entitled, *prima facie* at least, to the same effect as it would have if offered in evidence in the jurisdiction where it was rendered. Such is the case with foreign judgments, brought here for the purpose of being enforced by means of a new action; although in such case they have not the same conclusive character, and the *prima facie* operation may be rebutted, and the effect defeated by other evidence.—We have been unable to discover any satisfactory reason for a distinction between convictions in our own State, and like convictions in other of the United

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States, if the latter are to be admitted in evidence against the witness. If the conviction is not deemed sufficient to establish the infamy of the witness, and thus prevent his being heard, in accordance with the general rule admitting such evidence, there seems to us to be no substantial ground for making it an exception

to the other general rule, that particular facts, having no connection with the cause, are not to be given in evidence for the mere purpose of affecting the character of the witness, and thus impeaching his credit."

E. H. B.

CAMPBELL *v.* THE STATE.¹

June Term, 1836.

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A defendant who has been acquitted upon one of several counts in an indictment, is entirely discharged therefrom, nor can he a second time be put upon his trial upon that count.

Where a defendant has been acquitted on some counts and convicted upon others, a motion for a new trial made by him generally, is applicable only to the count upon which he was convicted, and if the court set aside the whole verdict, it is erroneous.

The prisoner was acquitted upon the first and third counts, but convicted on the second. He moved for a new trial, which was granted, and the entire verdict set aside by the court. Upon the second trial, he moved the court to put him on trial upon the second count only; this the court refused. Upon the second trial he was acquitted on the first and second counts, and convicted on the third. *Held*, that it was error in the court to set aside the verdict entirely, and that the accused was entitled to judgment of acquittal upon the first and third counts, because upon these he was acquitted by the jury upon the first trial, and that he was also entitled to judgment of acquittal upon the second count, because he was acquitted on that count upon the second trial.

THE plaintiff in error was indicted in the Circuit Court of Blount county, for larceny. In the first count, he was charged with having stolen a fifty dollar bank-note; in the second, he was charged with having received a fifty dollar bank-note from some person unknown, knowing it to have been stolen; and in the third count, he was charged with having received a fifty dollar bank-note from one Henson, a man of color, knowing that he had stolen it.

At the February term, 1836, of said court, the plaintiff in error was put upon his trial upon all the counts of the indictment, when the jury found that he was "not guilty in manner and form as charged in the first and third counts of the bill of indictment, but that he is guilty in manner and form as charged in the second count of the bill of

¹ 9 Yerger, 333.

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indictment." After this verdict was rendered, a new trial was moved for by the defendant, which was granted by the court, and in the language of the record, "the verdict was ordered to be set aside."

At the May term of the court, the defendant was again put upon his trial, whereupon he objected to being tried on the first and third counts, on which he had been acquitted; but the court ordered him to be tried upon the whole indictment, and the jury upon this trial found that he was not guilty as charged in the first and second counts of the indictment, but that he was guilty as charged in the third count. The counsel for the defendant then moved the court that he be discharged, which motion was overruled by the court. Reasons were then filed in arrest of judgment, but the court refused to arrest the judgment, and proceeded to pronounce sentence upon the prisoner, agreeably to the finding of the jury.

P. Lea and R. M. Anderson, for the plaintiff in error.

Geo. S. Yerger, (Attorney-General,) for the State.

GREEN, J., delivered the opinion of the court. It is insisted for the plaintiff in error, that as he was found not guilty as charged in the first and third counts of the indictment on the first trial, and on the second trial, he was found not guilty as charged in the second count, that he has been acquitted of the whole charge; that the trial the second time, upon the first and third counts, was against the constitution and laws of the land, and that he is entitled to be discharged from the prosecution.

The Attorney-General admits, that it is against law to try and punish a party for an offence of which he has been acquitted on a former trial; but he contends, that the verdict of the jury was an entire thing, and that the court could not set it aside in part without setting it aside altogether; and that as the new trial was granted upon the application of the plaintiff in error, in order to afford him the benefit which he sought, he was necessarily deprived of the verdict in his favor upon the first and third counts of the indictment.

An indictment is a written accusation of one or more persons, of a crime, presented upon oath by a jury of twelve or more men, termed a grand jury. 1 Chitty, *Crim. Law*, 168. It is frequently advisable to insert two or more counts in an indictment. 1 Chit. *Crim. Law*, 248. But every separate count charges the defendant as if he had committed a distinct offence, because it is upon the principle of the joinder of offences, that the joinder of counts is admitted. 1 Chit. *Crim. Law*, 249. In point of law, there is no objection to the inser-

tion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender. 1 Chit. Crim. Law, 253. And several persons may be joined in the same indictment, charged in separate counts, with distinct offences; but they must be of the same nature, and such as will admit the same plea, and the same judgment. Starkie's Crim. Pl. 48; 2 Hale, 174; 8 East, 46.

In all these cases of joinder, whether of different offenders or of different offences against the same individual, the jury may find a verdict of guilty upon some of the counts, and not guilty upon others. 1 Chit. Crim. Law, 638, 640, 641.

It is well settled, that where several defendants are tried at the same time, and some are acquitted and some convicted, the court may grant a new trial as to those convicted, without being under the necessity of setting aside the entire verdict. Tidd, 820; 6 T. R. 619. The establishment of this proposition defeats the argument upon which the Attorney-General mainly relies; and by showing that the verdict may be set aside in part, and as to part remain in force, and that this will be done, where different defendants may have been joined, and some were acquitted and some convicted, there can be but little difficulty in coming to a correct conclusion in this case.

We have seen that every count of an indictment contains a charge of a distinct offence, and that it is upon the principle of joinder of offences, that the joinder of counts is admitted. When, therefore, a party is acquitted of the charge in one count of the indictment, he is clear of that charge forever. He can no more be brought in jeopardy upon that charge again, than if it were the only count in the indictment.

In the case of *King v. Mawbry*, 6 T. R. 638, there was no question but that a defendant in a criminal case, who had been acquitted, could not be tried a second time. The only difficulty was, whether as those acquitted could not be again tried, those who were convicted could be relieved, however unjust the verdict. The Attorney-General argued that they could not, because the verdict was an entire thing, and could not be set aside in part. All the judges, however, in delivering their judgment, decide that a new trial may be granted to those who were convicted, although the others could not be tried again. Now where is the difference between that case, and the one under consideration? The same principle regulates the joinder of counts charging different offences against the same person, and counts charging different persons. Does it not seem to follow, that the consequences of a like finding should be similar? But it is said that in this case, the entire verdict was in fact set aside, and that as this was

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done upon the application of the defendant, he gave up his right to a judgment of acquittal upon the first and third counts, in order to get the benefit of another trial upon the second, and that he cannot now object that he was tried upon the whole indictment.

It is not necessary to determine how far a party could be held to even an express waiver of the benefit of a verdict of acquittal. It is enough that in this case, he has not done so. He moved for a new trial. We are not to suppose his application was more extensive than his necessities. As he had been acquitted upon two counts, he could have no motive to ask for another trial, except upon the one on which he was found guilty; and we are not to understand his application as going further. But the record shows that the judge in granting the new trial, set aside the verdict. This was error; it improperly revived the proceedings upon those counts on which he was acquitted.

In England, when a new trial is granted in favor of two defendants, who have been convicted, while others have been acquitted, in order to prevent the revival of proceedings against the latter, there are two methods which may be adopted, the first of which is, to alter the original *venire* so as to make it embrace those only who have been convicted; and the other is, to make an entry on the record, that the verdict was improperly taken against those who were convicted, and then to award a new trial, as far as they are concerned. 1 Chit. Crim. Law, 660; 6 T. R. 626. So in this case, the judge should have made an entry on the record that the verdict was improperly taken against the defendant on the second count, and as to that count, he should have awarded a new trial. Had this been done, the proceedings upon the other two counts would not have been revived. But although they were improperly revived, it was error to try the defendant a second time upon them. Every count charges a distinct offence. Having been once tried upon all the counts and acquitted of some of them, to try him again upon the same counts would be putting him in jeopardy a second time for the same charge, contrary to the tenth section of the bill of rights.

Suppose a party were charged in the same court, in three separate indictments, with three distinct offences, and to save time and trouble it were agreed that they should be joined, and that he should be tried in all the cases at the same time. If the jury in such case were to acquit him of two of the charges, and find him guilty of the third, and upon his application, a new trial were awarded, would it ever be thought that he could be tried again upon the charges of which he had been acquitted? Surely not; and yet the case before the court is the same in principle. Each of these counts charged a

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distinct offence. Upon the third count, the defendant has been heretofore tried and acquitted. The present conviction and judgment are, therefore, erroneous, and must be reversed, and the defendant discharged.

Judgment reversed.

It is frequently the practice where a crime is of a complicated nature, or where it is uncertain whether the evidence will support the charge in its highest and most criminal degree, to insert more than one count in an indictment; in which case the several counts are intended to describe the same transaction in different ways. But distinct offences may also not unfrequently be set forth in different counts in the same indictment; i. e., offences of the same general nature, having the same mode of trial, and with a punishment of a like nature attached to each. *The Commonwealth v. Hills*, 10 Cushing, 530, (1852); *Carlton v. The Commonwealth*, 5 Metcalf, 532, (1843.) In which cases the several counts are considered as several indictments, not connected with each other and not dependent upon each other. Each count should, to be sufficient, contain the same allegations as if it stood by itself. One count ought not to refer to another to supply a defective allegation or an insufficient description. A verdict may be received, and judgment entered upon the valid count, and judgment arrested upon the defective one, or the jury may be discharged from the consideration of a count upon which they are not agreed, returning a verdict only upon the other. Such being the relation of different counts to each other, it would be natural to suppose that if a defendant on the first trial be acquitted upon one count, and convicted upon another, he would, upon a second trial, which may be obtained on his motion, be subject to the hazard of a second conviction only upon that count upon which he was formerly convicted. This, doubtless, would be so, both at common law, and under that provision of the Constitution of the United States which declares that no person shall twice be put in jeopardy for the same offence. This

rule was applied in *The State v. Kille*, 2 Tyler, 471, (1803,) in which the first three counts were for a riot, and the fourth for a common assault and battery. Being convicted on the last, the defendant appealed, and it was held that he could be tried the second time only upon the fourth count. And see to the same effect, *Lillegow v. The Commonwealth*, 2 Virginia Cases, 297, (1822); *Morris v. The State*, 8 Smedes & Marshall, 762, (1847); *Esmen v. The State*, 1 Swan, 14, (1851). *Campbell's case* is therefore well supported by authority as well as principle.

A contrary view was, however, entertained by the Supreme Court of Indiana in *The State v. Morris*, 1 Blackford, 37, (1819.) It was there thought that where a defendant indicted for burglary in one count, and larceny in another count, was on the trial found guilty only of the larceny, but moved for, and obtained a new trial, he was to be again arraigned and tried for burglary as well as larceny. This position was not, however, necessary to the decision of the case, since, on the second trial, the defendant had been again convicted of only larceny, and then he objected that the second trial for burglary was improper, because it might have had an improper influence with the jury on the charge of larceny. The case was determined for the prisoner, however, on a wholly different point, and the dictum "that he who desires a new trial, must receive it as to the whole case," can hardly shake the reasonable rule before laid down.

The main argument in favor of this view is that a verdict is an entirety, and if that part of the verdict finding the defendant guilty on some counts be set aside, the other portion acquitting him on some counts must share the same fate, and the whole case is to be placed in *status quo*. But in answer to that it may be said that

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a verdict acquitting some defendants and convicting others, is as much an entirety as a verdict on different counts against only one defendant, and yet there is no pretence that such a verdict, if set aside as to those convicted, is also to be disturbed as to those acquitted on the first trial. The rule of the principal case, however, seems to be the better law in cases of several counts in the same indictment. But where there is but one count in the indictment, and the defendant is convicted thereon upon a less offence than that principally charged, but obtains a new trial, does he not again expose himself to the whole charge? How can he be the second time arraigned and put to trial, except upon the indictment *as it is*. Such a case differs from that before suggested, where the indictment contains several counts, on some of which the defendant is acquitted, and on some convicted. Thus, on a trial for murder, suppose a defendant to be convicted of manslaughter merely, and obtain a new trial on his own motion, may he not be again tried for murder, and possibly convicted thereon? Such was the recent case of *The United States v. Harding*, 9 Wallace, Jr. 127, (1848,) in which Judge Grier so laid down the law.

It is true some tribunals have thought (contrary to *Harding's case*), that if the defendant be once acquitted of the murder and convicted of only manslaughter, he will on the second trial be liable only to the minor offence. It is argued that the court on an indictment for murder, may as easily confine the attention of the jury to the charge of manslaughter, if there is no count charging that offence, as if there were one. Such was the decision in Tennessee, in *Slaughter v. The State*, 6 Humphreys, 410, (1846,) followed in Mississippi in *Hunt v. The State*, 25 Mississippi, 378. And the same rule was deliberately adopted in *The People v. Gilmore*, 4 California R. 376, (1854,) and *Harding's case*, ante, was commented upon and disapproved. See also *Brennan v. The People*, 15 Illinois, 511, (1854.)

But suppose, as is often the case, the jury at the first trial convict on some counts, and are silent upon the others,

what then? Is the defendant acquitted, or not, upon such counts? If he obtains a new trial generally, shall he be tried on the whole indictment, or only upon those counts upon which he was at first convicted? The weight of modern authority is that a verdict finding the prisoner guilty on one or more counts, and saying nothing as to the other counts, is equivalent to a verdict of not guilty upon such latter counts, and is so far a complete verdict as to enable the court to render final judgment upon it. See *Stoltz v. The People*, 4 Scammon, 168; *Swinney v. The State*, 8 Smedes & Marshall, 576, (1847); *Morris v. The State*, Id. 762, (1847); *Weinzorpflin v. The State*, 7 Blackford, 186, (1844); *The Commonwealth v. Bennet*, 2 Virginia Cases, 235, (1820); *Kirk v. The Commonwealth*, 9 Leigh, 627, (1838); *The State v. Coleman*, 3 Alabama, 14, (1841); *Nabors v. The State*, 6 Alabama, 200, (1844.)

And this practice is supported on the ground that finding a party guilty of manslaughter, on an indictment for murder, must of necessity operate as an acquittal of every crime of a higher grade of which he might be convicted on that indictment; otherwise the defendant might, after undergoing a sentence for manslaughter be again put on his trial for the charge of murder. The jury in such case are, in contemplation of law, said to render two verdicts, one acquitting of murder, and one convicting of manslaughter. They must necessarily determine the question of his guilt or innocence of the higher crime before proceeding to consider whether he is guilty of the inferior crime. A verdict of manslaughter on a charge for murder is as much an acquittal of the higher crime, as would be an express finding of that fact, since the result of both is to exempt the accused forever from the penalty of the law for the murder. There are, however, some cases which still adhere to the old doctrine that if distinct offences are charged in separate counts of the same indictment, the verdict must expressly find the defendant either guilty or not guilty upon each count, or no judgment can be rendered. See *The*

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State v. Sutton, 4 Gill, 494, (1846); *King v. Hayes*, 2 Lord Raymond, 1521; *Wilson v. The State*, 20 Ohio, 26, (1851.) And this strictness has been sometimes pushed even further, to the extent that if there be but one count, which involves different grades of offences, and the jury find the defendant guilty of only the lower grade, the verdict should expressly negative the guilt of the higher offence, or it will be invalid. As, if on a trial for murder, manslaughter only be proved, and the jury find the prisoner guilty only of that offence, they must also say "not guilty of murder." Such is the rule laid down in *The State v. Flannigan*,

6 Maryland, 167, (1854.) And see *Rez v. Mansell*, 1 Anderson, 103.

And this is said to be so, because murder and manslaughter are *different crimes*, and not merely different *degrees* of the *same* crime. And if this is the reason, the same rule would not prevail in those States where by statute different degrees of murder are established; for in such cases the jury might find a prisoner "guilty of murder in the second degree," without saying not guilty of murder in the first degree, and such verdict would be valid. See *Weighorst v. The State*, 7 Maryland, 442, (1855.)

E. H. B.

THE COMMONWEALTH v. PETER YORK.¹

March Term, 1845.

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When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution, or from evidence offered by the defendant.

But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence.

WILDE, J., dissenting, *held*, 1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing.

2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner.

3. That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him.

THE defendant was indicted for the murder of James Norton. His counsel, at the trial, attempted to show that his offence was man-

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slaughter. The evidence at the trial, so far as it relates to the questions of law hereinafter discussed, is stated in the opinion of the majority of the court, as given by the chief justice. After the case was committed to the jury with instructions from the court, and they had been in consultation several hours, they sent to the court this question: "Were the jury instructed by the court, that the prisoner must prove provocation or mutual combat, and was not to have the benefit of any doubts on the subject?" To this question the court gave the following answer: "It is hardly possible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused; and this may appear, either from evidence adduced by the prosecution, or evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of proof on one side or the other. But if the case, on the evidence, should be *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused; that is, in a case like the present, in favor of the lesser offence. But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance."

The jury found the defendant guilty of murder, and his counsel moved for a new trial, on the ground that the jury were misdirected.

R. H. Dana, Jr., for the defendant. A killing may be criminal or not criminal; and if criminal, it may be murder or manslaughter. From the mere act of killing, there is no presumption in nature, or from experience, that it is murder rather than manslaughter. Of all the homicides that are committed, few are found to be murders. A presumption of murder, from the mere fact of killing, is therefore contrary to reason and experience, as well as against liberty and life; and it should not be enforced without the clearest proof of its unavoidable obligation upon the court.

The question now before the court respects the burden of proof. The jury were satisfied that the prisoner killed the deceased. They were not satisfied that he killed him of malice. In this state of mind they asked the court for the rule of law. If the court had ruled

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that the malicious killing was a single proposition, of the truth of which the jury must be satisfied beyond a reasonable doubt, the verdict would have been for manslaughter. But the court separated the proposition into two parts, the killing and the malice, and instructed the jury, in effect, that malice need not be proved, but was to be inferred, by a technical presumption, from the killing, and that the burden of proof was shifted upon the prisoner to disprove it. This burden was indeed lightened by requiring him to produce only a preponderance of belief, or an equilibrium, in favor of his defence. But this was *ex gratiâ*, and the principle is the same. The presumption was enforced, and the burden shifted upon the prisoner.

Burke says, "civil cases regard property." Now although property itself is not, yet almost every thing concerning property, and all its modifications, is of artificial contrivance. The legislator therefore always, the jurist frequently, may ordain certain methods by which alone they will suffer such matters to be shown and established; because their very essence, for the greater part, depends on the arbitrary conventions of men. They make fictions of law, and presumptions of law, according to their ideas of utility. But where the subject is of a moral nature, independent of their connections men have no other reasonable authority than to register and digest the results of experience and observation. The presumptions that belong to criminal cases, are those natural and popular presumptions which are only observations turned into maxims." This distinction between artificial and natural presumptions is recognized by the text writers; and the former are nowhere applied to criminal cases. Best on Presumptions, 18, 43, 208, 308. Wills on Circumstantial Ev. 29.

The presumption, in the present case, is purely artificial and technical. No fact can be added, like that of using a deadly weapon; for the ruling was, that the mere fact of killing supports the presumption. Nor is it a presumption of criminality only, which the law raises; for there is no doubt of the criminality of the act. The only question is as to the degree; and it is here that the law is supposed to enforce a presumption of the greater degree of guilt, rather than the less.

Suppose the jury had returned a special verdict, viz., that the prisoner killed the deceased, and that the killing was criminal, but that they had reasonable doubts whether it was malicious; could the court have entered a judgment of guilty of murder? Yet such would be the legal effect of that finding, if the doctrine of the instructions be true.

The jury were not allowed to be judges even of the facts. A fact was given to them, with an artificial weight attached to it by law, which they were not at liberty to disregard. They were required to

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draw an inference from it, which, in their judgments, as reasoning and observing men, they never would have drawn. They do not draw it now. The law draws it. The prisoner has not had what he is entitled to, namely, the unbiassed moral conviction of the jury that he is guilty of murder.

By the instructions given to the jury, their verdict was made to depend, not upon their convictions, but upon the burden of proof, which is governed by technical rules. If a reasonable doubt arises as to the fact of killing, the identity of person, an *alibi*, or the like, the prisoner has the benefit of it. But if it arises as to the malicious intent, which is the gist of the charge, he is to be convicted of malice, whether it be or be not supported by proof, unless he rebuts the charge. But it has always been held, in this Commonwealth, that in criminal trials the burden of proof never shifts. *The Commonwealth v. Kimball*, 24 Pick. 373. *The Commonwealth v. Dana*, 2 Met. 340.

It will be contended, in behalf of the government, that though, as a general rule, the burden of proof does not shift in criminal cases, and though a defendant is entitled to the benefit of every reasonable doubt, yet that there is an exception in the case of homicide. And the text books contain loose language that imports such an anomaly. But it is not found in any decision of a court. The history of the law of homicide accounts for the rise and transmission of this language. At an early period, if the homicide was proved, a verdict of murder was returned; and if there were circumstances of excuse, a pardon was sued out. At a later period, the punishment of murder and manslaughter was the same. Both offences were equally clergyable, before the *St. of 23 Hen. VIII.*; and a distinction between them was hardly recognized. So far was this true, that the nature of the prisoner's intent needed not to be alleged in the indictment. But that statute inflicted death, without clergy, upon persons convicted of wilful murder with malice prepense. Even after the degree of punishment was altered, the verdict was always for murder, if there was a felonious homicide, with a recommendation of a commutation of punishment, if there was no sufficient proof of malice prepense. A separate verdict for manslaughter was new in Elizabeth's time. 4 Bl. Com. 201; Dyer, 261. When the verdict and the punishment were the same, there was no need of strictness in the distinctions. It was enough to know, that if the killing was proved, the party was to be convicted generally. Hence a criminal intent and a felonious intent were convertible terms; and so were murder and felonious homicide. Mr. Justice Story says: "Malice, in the true sense of the law, at least in all cases except that of murder, signifies no more than a wilful intent to do a wrongful act. In cases of murder, there is

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an accompaniment, indicative of its being used in a more intense sense—'malice aforethought.'” *The United States v. Taylor*, 2 Sumner, 586. The word malice, in all the earlier cases, meant no more than criminality. The *St. of Hen. VIII.* recognizes degrees of criminality in homicides, and makes malice *prepense* the definition of murder, in contradistinction to simple malice, or mere criminality, which is equally predicable of manslaughter. This distinction has been gradually unfolded. The earlier cases use malice in the general sense. We have taken such instances and applied them to the new state of the law.

An argument against the instruction arises from the fact that the court was obliged to make a new rule; the rule of *preponderance* and *equilibrium*. These words are nowhere to be found in the criminal law, until introduced on the trial of *Rogers*. 7 Met. 500. See Best on Presumptions, 257. Even if the language of the text books is to be adhered to, and proof of the killing is held to throw the burden on the prisoner, what is that burden? It is a prisoner's burden, the only burden ever put upon him by the law, that of satisfying the jury that there is a reasonable doubt of his guilt.

S. D. Parker, for the Commonwealth. The instruction to the jury was the same that was given in *The Commonwealth v. Rogers*, 7 Met. 500; and the defendant was allowed the advantage of an equilibrium of proof, in a matter which he was bound to prove. This was more favorable to the defendant than is warranted by any case, except that of *Rogers*.

Generally, the rules of evidence are the same in criminal cases as in civil; and in civil cases the burden is on the party who takes the affirmative. *Phelps v. Hartwell*, and *Blaney v. Sargeant*, 1 Mass. 71, 335; *Buckminster v. Perry*, 4 Mass. 593; *Phillips v. Ford*, 9 Pick. 39; *Loring v. Steineman*, 1 Met. 211. When a *prima facie* case is made by a plaintiff, the burden of proof is shifted upon the defendant, and he must prove matter of avoidance. *Gray v. Gardner*, 17 Mass. 189; *Attleborough v. Middleborough*, 10 Pick. 378; *Davis v. Jenny*, 1 Met. 224. See also *Powers v. Russell*, 13 Pick. 76.

When the law presumes the affirmative, it lies on the party who denies the fact to prove the negative. 1 Stark. Ev. 380. And it has been held, for centuries, that when a homicide is proved to have been committed, the law presumes it to have been malicious, and to be murder, until the contrary appears; that it is for the accused to show, satisfactorily, the circumstances which justify, extenuate, or excuse the act. 1 Hale, P. C. 455; Foster's Crown Law, 255; Kelyng, 27; 1 Hawk. c. 31, § 32; 1 East, P. C. 224, 340; 4 Bl. Com. 201; Roscoe Crim. Ev. (2d ed.) 20; *The King v. Onghy*, 2 Ld. Raym. 1493, and

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2 Stra. 773; *Mitchell v. The State*, 5 Yerg. 340. This doctrine was laid down in the case of *The Commonwealth v. Phillips*, tried in this court in 1817, as appears in a pamphlet report thereof, p. 45; also in *The Commonwealth v. Knapp*, 10 Pick. 484. In *The Commonwealth v. Dana*, 2 Met. 329, the same rule was applied in the case of a minor offence.

G. W. Phillips, in reply. The government is bound to prove the homicide, and that the defendant committed it, and that he did it maliciously. If there be any reasonable doubt on either point, the defendant is entitled to an acquittal of the charge of murder. Best on Presumptions, 267. This is clearly so, unless a presumption of law alters the case, and throws upon the defendant the burden of negating the malice. But the counsel for the government has failed to produce a single *adjudication* that the burden is thus shifted. The *dicta* of judges and text writers, to this effect, are indeed numerous. But this was accounted for in the opening argument for the defendant, and may be further explained, by referring it to the arbitrary rules introduced by the Norman conqueror, and stated in Kelyng, 121-124, and 4° Bl. Com. 194. The case of *The Commonwealth v. Dana*, 2 Met. 329, does not support the position taken for the government, but the contrary. It was there held that the burden of proof was not shifted. In *The Commonwealth v. Rogers*, 7 Met. 500, the defence was insanity, and the presumption of sanity is warranted by all experience and observation. But the presumption of malice, in case of homicide, is not thus warranted. See opinions of the judges, in *The King v. Burdett*, 4 Barn. & Ald. 140, 149.

The opinion of a majority of the court was delivered by

SHAW, C. J. A motion has been submitted by the counsel for the prisoner, after conviction, for a new trial, for a misdirection in point of law, in the instructions of the court to the jury. Such a motion is of rare occurrence; and as a capital trial is by law a trial before a full court, it cannot be considered as a matter of course, and if allowable at all, it must be on occasions of real difficulty and importance.

On the present trial, after the jury had retired to deliberate on their verdict and had been some time in consultation, they requested a further instruction of the court; and the court, after a short deliberation, gave them instructions upon the point proposed. The court, although they took as much time for consideration as the circumstances of the case then admitted, had yet little time and opportunity for reflection and the examination of authorities, and were very willing to reconsider the subject, under the light which might be thrown upon it by the arguments of counsel and the citation of authorities.

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We have had the aid of a full and able argument by learned counsel, and are now prepared to state the result. It is a subject of unfeigned regret, that on a question of this extreme delicacy and magnitude, the members of the court have not been able to come to a unanimous opinion. But after a repeated examination of authorities, and the fullest discussion and interchange of opinion, we have not been able to come to such a desirable result. It has become my duty to state the opinion of a majority of the court.

In order to the better understanding of the question put by the jury, and the instructions of the court given in answer thereto, it seems proper to state briefly the course of the trial, and the questions in fact submitted to the jury.

The prisoner was indicted for the wilful murder of James Norton, on the night of the 2d of July, 1844, between eleven and twelve o'clock. There was plenary evidence tending to prove that the said Norton, at the time and place stated in the indictment, received a mortal wound by a dirk knife, the blade of which had penetrated his heart, and was found, on a *post mortem* examination, broken off in the body of the deceased; of which wound he almost instantly died; and that this wound was inflicted by the hand of the prisoner. There was some evidence tending to show some struggle and contest between the parties, at or shortly before the time at which the mortal wound was given, and some conflicting evidence in regard to the fact and to the circumstances of such contest and struggle. The ground originally taken by the prisoner's counsel was, supposing the charge of killing to be proved, that the act was done in excusable self-defence, or, that if it was a culpable homicide, it was not done with malice, so as to make it murder, but done in heat of blood in mutual combat, or under such provocation as the law admits to be sufficient to extenuate the offence, and reduce it to manslaughter. The defence was ultimately placed mainly on the latter ground, and one of the questions submitted to the jury was, whether there existed such heat of blood in mutual combat, or such sufficient provocation, so as to reduce the homicide to manslaughter.

The question put by the jury, some time after they had withdrawn from the bar, and the answer thereto by the court, were thus: [Here the chief justice stated the question and the answer, as set forth, *ante*, p. 505.]

The motion for a new trial is made on the ground that this was a misdirection, and that the jury should have been instructed that, if there was sufficient evidence to raise a reasonable doubt, whether the homicide was malicious, or committed in heat of blood in mutual combat, or suddenly, upon adequate provocation, so as to extenuate it to manslaughter, then they should return a verdict of manslaughter. This is the question we are to consider.

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In the first place, it is proper to consider what the nature of the homicide was, in the present case, to distinguish it from other species of homicide, and consider what was the nature and tendency of the evidence, upon which the instruction was prayed by the jury.

There may be cases of homicide, properly ruled murder by implied malice, when there was *no intention* to take the life of the deceased party; as where one wantonly throws timber from a house into a street in a populous town, regardless of consequences; or where one feloniously shoots at tame fowls, with intent to steal them, and the ball accidentally hits a man and kills him; or where one wantonly suffers a wild beast to go at large; or where one rides an unruly horse into a crowd; or where a mother exposes her infant child in a garden, and it is killed by a kite; or where the overseers of different parishes shift a pauper infant child from one parish to the other, in a contest which shall support it, until it dies of cold and hunger; or where a son wantonly exposes his sick father to the cold, so that he dies; or where a woman places her child in a hog-sty, to secrete it, and it is destroyed. All these (and many more cases, mentioned in the books, might be named,) are cases where death ensues from acts done recklessly and wantonly, under circumstances of inhumanity and cruelty, indicating a heart devoid of social duty, and fatally bent on mischief. But as the question, whether such homicide be murder, or manslaughter, must depend upon the degree of carelessness, cruelty or malignity, presented by the evidence, depending upon the particular facts and circumstances, the malice must be an inference of fact from these circumstances; and if thereby a reasonable doubt exists, upon the evidence, whether the fact of malice is proved, a jury may be properly instructed to return a verdict of manslaughter. But the case, to which the rule we are now considering applies, is one where the life of the deceased has been taken by the accused, by a voluntary act, a wound inflicted with great violence, with a deadly weapon, and upon a vital part.

The distinguishing characteristic of murder is homicide with malice aforethought, express, or implied by law. The effect of the rule presented to the jury was, that if it was proved, beyond reasonable doubt, that the defendant had wilfully and voluntarily inflicted a mortal wound upon the deceased, malice was to be inferred from this act, unless such facts were proved, by a preponderance of the evidence, as would extenuate the homicide and reduce it to manslaughter. This rule seems to rest on well-settled principles, and to be supported by a great weight of authorities.

A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or

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wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life, or do him some great bodily harm, is a necessary conclusion from the act.

But, however suddenly any act is done, the intent to do it precedes the doing of it, and the act is done in pursuance of the intent and formed design. However short the interval, the intent necessarily precedes. This is manifest from the ordinary case of a mortal blow given, with a deadly weapon, immediately upon words of provocation. Words, however aggravating, not being considered a sufficient provocation to extenuate the offence to manslaughter, it is uniformly held to be murder, an act done with malice prepense; and it is not the less preconceived, because the act immediately followed the guilty intent. There was obviously no intent to do the act of violence, until the provocation was offered; and although it is said that the act of resentment follows *immediately*, yet such is the rapidity with which the mind operates and forms its purposes, and so instantaneously does the hand execute the purposes of the will, that the moment which intervenes is sufficient for the operation of the malignant motive. Otherwise, the suddenness of the mortal blow, on provocation however slight, must exclude the implication of malice. But the law, in such cases, does impute malice to the act, because it does not consider the weight of the provocation such as naturally to arouse so violent a resentment; and as an act so violent and cruel cannot be attributed to a natural resentment, incident to the infirmity of human nature—on which ground alone it can extenuate the homicide—it is necessarily attributed to malignity of heart.

Malice, in the definition of murder, is imputed to an act done wilfully, *malo animo*, an act wrong in itself, injurious to another, and for which there is no apparent justification or excuse. Such justification or excuse must depend on the existence of facts; and such facts must be proved and found in order to be the basis of any judicial decision. The wilful and voluntary act of destroying the life of another, is an act wrong and unlawful in itself, injurious in the highest degree to the rights of another, being the greatest wrong which can be done to him, contrary to the laws of nature as well as society,

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and in violation of the plainest dictates of conscience. The natural and necessary conclusion and inference from such an act wilfully done, without apparent excuse, are, that it was done *malo animo*, in pursuance of a wrongful injurious purpose, *previously*, though perhaps suddenly, formed, and is therefore “a homicide with malice aforethought,” which is the true definition of murder. And it appears to us, that this is not a forced, arbitrary, technical or artificial presumption of law, but a natural and necessary inference from the fact. This will be more apparent from considering what malice, in legal contemplation, is, and how it is inferred from illegal and wrongful acts, in other cases of crimes and offences of less magnitude.

Malice, although in its popular sense it means hatred, ill will or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrong and unlawful motive or purpose; the wilful doing of an injurious act without lawful excuse.

Mr. Justice Bayley, in giving the opinion of the court in *Bromage v. Prosser*, 4 Barn. & Cres. 255, though on a subject widely different from homicide, thus gives the legal description of malice, in contradistinction to the popular sense, in which the term is commonly used: “Malice, in common acceptation, means ill will against a person; but in its legal sense it means, a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse.” This is sometimes called malice in law, in contradistinction to malice in fact, because the law draws the inference from the fact. So, in civil actions, and prosecutions for minor offences, some authorities in our own books, and in recent cases, illustrate this legal doctrine of malice. In *Wills v. Noyes*, 12 Pick. 324, the court charged the jury that legal malice might differ from malice in the common acceptation of the term; that to do a wrong or unlawful act, knowing it to be such, constituted legal malice. This was affirmed by the whole court, who say, that whatever is done, “with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, constitutes legal malice.” So, in a more recent case, *The Commonwealth v. Snelling*, 15 Pick. 340, the court, after noticing the legal and popular meaning of the term “malice,” say, “in a legal sense, any act done wilfully and purposely, to the prejudice and injury of

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another, which is unlawful, is, as against that person, malicious." See also Foster's Crown Law, 256; Russell on Crimes, (1st. ed.) 614, note.

These instances, taken from cases having no analogy to the crime of homicide, are adduced to show, that the presumption of malice, from a wrongful and injurious act wilfully done, when applied to homicide, is not technical, or artificial, or invented for the particular occasion, but is the result of a mode of legal reasoning which is of general application.

The same doctrine is laid down, as the undoubted law of England, in a recent work of good authority, frequently republished and in extensive use in this country; 2 Stark. Ev. 903; in which the writer states the general doctrine I have been stating, that "malicious" imports nothing more than the wicked and perverse disposition with which the party commits the act; and he illustrates the general proposition by a reference to this presumption of malice in the case of homicide. His words are: "The application of the term 'malicious' is strongly illustrated in the case of homicide, where the *malus animus*, which brings the offence within the denomination of wilful murder, is frequently to be collected by the court, as a matter of law, from the circumstances of the case, and is not an inference of fact to be drawn by a jury, as it must necessarily be whenever malice consists in the *specific intention* actually existing in the mind of the agent, at the time of the act." And it is remarkable that Mr. Greenleaf, whose recent treatise on evidence is to be regarded rather as a discussion and statement of the grounds and principles of the theory of proof in general, than as a detail of the rules of evidence, puts forth this same presumption of malice, not as an arbitrary or technical rule, but as a natural inference, drawn by a fair course of reasoning, from the laws of nature, the experienced course of human conduct and affairs, and the connection usually found to exist between certain things, and, in this respect, standing upon the same footing as inferences from the known laws of nature. He adds, "The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application." 1 Greenl. on Ev. § 14. He then distinguishes between those which are conclusive, and not capable of being rebutted by proof, and those which are disputable, and may be overcome by opposing proof. Of the latter, the following is the illustration: "Thus, on a charge of murder, malice is presumed from the fact of killing, unac-

accompanied with circumstances of extenuation; and the burden of disproving the fact is thrown upon the accused." § 34.

I shall have occasion, hereafter, to state more fully that the term 'deliberate,' as used in the first of these passages, does not, in its legal acceptation, so much import an act done after time for reflection, as a voluntary act, an act done upon motive, of purpose and design, in contradistinction to acts done in the heat of passion, a paroxysm of resentment, in which reason and choice, for the moment, have no agency. The books constantly speak, in this connection, of a deliberate act, *however sudden*. Whereas, if deliberation implied time and reflection, a deliberate act could never be sudden. So it has been held in Pennsylvania, under a statute which requires premeditation to constitute murder in the first degree, that the intention to kill, though immediately executed, is still the true criterion of the crime, and that the intention of the party can be collected only from his words and actions. *Respublica v. Mulatto Bob*, 4 Dall. 146. And in various other cases under the statute, it has been decided that, where it appears from the whole evidence that the crime was, *at the moment*, deliberately or intentionally executed, the killing is murder. It is sufficient, if the circumstances of wilfulness and *deliberation* are proved, though they arose and were generated at the period of the transaction. *The Commonwealth v. Dougherty*, 1 Browne, Appx. xviii. *Pennsylvania v. M'Fall*, Addison, 257.

I will add a few other authorities to show that the inference of malice from unlawful acts is not an artificial rule of law, but a natural inference, legitimately deduced from facts admitted or proved, and that it is not peculiar to the law of homicide, but prevails in all other departments of the criminal law. In *The King v. Dixon*, 3 M. & S. 11, the defendant was indicted for delivering bread, mixed with unwholesome and noxious materials, as good and wholesome bread, for the use of the children of the Royal Military Asylum at Chelsea. There was a motion in arrest, for the cause, among other things, that the indictment did not show that the defendant intended to injure the children's health; whereupon Lord Ellenborough said: "It was an universal principle, that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act, and here it was alleged that he delivered the loaves for the use and supply of the children." In *The King v. Philp*, 1 Mood. Cr. Cas. 263, the prisoner was charged with burning a ship of which he was part owner, the primary purpose being to defraud the underwriters. But the evidence not being produced to prove the fact of insurance, that intention was not proved. But there were counts charging the accused with burning the ship, of which he was also master, with an

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intent to injure the other part-owners, and the case proceeded on them. It was argued by the counsel for the prisoner, that the intention to defraud his co-proprietors was not proved, but that a different intent was shown. But it was answered and resolved by the court, that voluntarily setting fire to the ship, and destroying her, was a wilful act; that it tended to a destruction of the property of others; and that it was a necessary inference of law, that he intended to injure them. The case of *The King v. Farrington*, Russ. & Ry. 207, is to the same effect.

There is a very recent case to the same point, *The Queen v. Hill*, 8 Car. & P. 274. On the trial of an indictment, before Mr. Baron Alderson, the prisoner was charged with uttering a forged bill of exchange, with intent to defraud Samuel Minor. The counsel for the prisoner, in addressing the jury, submitted that, on the evidence, they ought to negative the intent to defraud, because there was evidence, as he contended, that the prisoner intended himself to take up the bill. The learned judge told the jury that the questions for them were, whether the defendant uttered the bill, as a true bill, to Minor, and whether, if he did so, he knew, when he did so, that it was forged; and he instructed them that, if they should find these two facts, then they ought to find, as a necessary consequence of law, that the prisoner meant to defraud. "A man," said he, "must be taken to intend the consequences of his own acts, and must intend to defraud, if he pays another a false note instead of a real one." And this decision was affirmed by the fifteen judges. See also *The King v. Sheppard*, Russ. & Ry. 169.

That one shall be presumed to intend the natural consequences of his own acts, was decided in the remarkable case of *The King v. Woodburne & Coke*, in 1722, referred to in most of the books on crown law, and reported at large in 16 Howell's State Trials, 54. The indictment was founded on the Coventry Act, charging the accused with lying in wait, and attacking Edward Crispe, with a sharp and heavy instrument called a bill, with intent to maim and disfigure him; and proof of this intent was necessary to bring the case within the act. The proof was, that they conspired to murder him; struck him repeated blows, with a hedge bill, in his face and on his head, by which his nose was slit; and left him for dead; but that he afterwards recovered. The ground taken by Coke was, that the act was done, not with an intent to disfigure, but to murder. But it was answered and resolved, that striking a man in the face with such a weapon, with an ultimate purpose of murdering him, had a direct tendency to maim and disfigure him, and therefore he must have intended that result; and he was convicted and executed.

I shall now consider the more direct question, whether the instruc-

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tion to the jury, in the present case, was right and conformable to law. As a preliminary to this inquiry, we must first ask where we are to look for the governing rules and principles of law on this subject. The statute of the Commonwealth provides that murder shall be punished with death; and it prescribes a milder, but still a severe, punishment for manslaughter. But our statutes nowhere define murder or manslaughter. They do not declare what act shall constitute either of the offences, nor what acts of homicide shall be deemed justifiable or excusable. We are then obliged to seek for these rules and principles in the common law. Our English ancestors, on their first settlement of a colony here, as it has been significantly expressed, brought the common law with them, and claimed it as their birthright, so far as it was applicable to their state and condition. After the establishment of a new form of government, by the grant of the provincial charter, in 1692, one of the first acts of the new government was, to continue in force all the local laws made under the colonial government. And, as we continued to be English subjects, the laws of England, with some modifications, continued in force till the revolution. And by our present Constitution, part 2, c. 6, art. 6, it is declared, that "all the laws which have heretofore been adopted, used and approved, in the province, colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." These provisions have effectually adopted the rules and principles of the common law of England, as the laws of this Commonwealth, so far as they are applicable to our condition, and given them an authoritative and binding force and effect. To this great storehouse of learning and intelligence we must resort, as well for the rules and principles of law, as for the precedents, forms and modes of practice, as they existed at the time of our revolution, and not since otherwise provided for by statute. As this is an unwritten law, we must seek for the evidence of it in judicial records, precedents and decisions, and those digests, treatises, and commentaries of learned and experienced men, which have acquired respect and confidence by long usage and general consent. If we consult English decisions made since the revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law, by men of great experience and judgment in the knowledge and application of the same laws which we are seeking to expound. And if we read the digests and treatises of reputable authors, published since we ceased to be English subjects, it is because they contain the authentic records of the precedents and judicial proceedings,

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which furnish the evidence of the common law. In like manner, the decisions of courts of other States, having the same common origin, and deriving their laws from the same common source, are valuable and useful, in enabling us the more clearly to understand, and the more fitly to apply, the rules and principles of our own authoritative code of laws.

With these views of the sources of inquiry to which it is necessary to resort, I will proceed to the investigation.. I will, in the first instance, cite the rule as laid down by Sir Michael Foster, an eminent judge of the highest court of criminal jurisdiction, many years before our revolution, when the people of Massachusetts were under English jurisdiction. He was also a most acute, discriminating and exact writer, whose chapter on the law of homicide has been a work of standard authority on that subject, for a century. Sir William Blackstone says of him, that he was a very great master of the common law. In a case of great public interest, in which a *habeas corpus* had issued from the Court of King's Bench, to obtain the discharge of the Lord Mayor of London, who had been committed to the tower of London, by the house of commons—a case involving critical questions in regard to the liberty of the subject and the power of the commons—Lord Chief Justice De Grey delivered his opinion, in which the other judges concurred, refusing to discharge the party, and remanding him to the tower. On that occasion, citing, among others, the opinion of Mr. Justice Foster, in support of his opinion, he speaks of him as one “who may be truly called the *magna charta* of liberty of persons, as well as fortunes.” 3 Wils. 203. His work was cited at large by the court, and apparently relied on, as authority for a very important point of law, in the case of *The Commonwealth v. Knapp*, 9 Pick. 517.

The rule is thus stated in Foster's Crown Law, 255: “In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is that the law should so presume. The defendant, in this instance, stands upon just the same ground that every other defendant doth; the matters tending to justify, excuse or alleviate, must appear in evidence, *before he can avail himself of them.*”

As this was not a judicial opinion, given in the actual administration of justice, it may become necessary to trace it to an earlier source.

Lord Coke, in 3 Inst. 47, having described murder as homicide, “with malice forethought, either expressed by the party or implied

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by law," proceeds, in p. 51, thus to define malice prepensed: "Malice prepensed is when one compasseth to kill, wound or beat another, and doth it *sedato animo*. This is said in law to be malice forethought, *prepensed, malitia præcogitata*." Here, perhaps, the same remark may be made on the word "*sedato*" which was before made on the word "deliberate;" that it rather denotes an act done in pursuance of a motive, with an intent and formed design, in contradistinction to an act done in an ebullition of anger, in which reason and judgment are for the moment suspended. But whether or not this is the true meaning intended to be expressed by Lord Coke, I think it is made clear, by his definition of implied malice, on the next page. "First, in respect of the manner of the deed. As, if one killeth another without any provocation of the part of him that is slain, the law implieth malice; whereof you may read in *Mackalley's case*," 9 Co. 67 b.

Mackalley's case was heard before all the judges, on a special verdict, on an indictment of several persons for the murder of a civil officer. Many points were considered and adjudged, and it is difficult, without making too large an extract, to state the exact point decided on this subject. But I understand it to be stated by Lord Coke, as decided by all the judges and barons, that "if one kills another without provocation, and *without any malice prepense which can be proved*, the law adjudges it murder, and implies malice; for by the law of God every one ought to be in love and charity with all men; and, therefore, when he kills one without provocation, the law implies malice, and he may be indicted generally, that he killed of malice prepense; for malice implied by law, given in evidence, is sufficient to maintain the general indictment." This case, decided in the reign of James I., on great consideration, by all the judges, appears clearly to decide the point, that if the *fact* of killing is proved, and on this proof of the homicide no excuse or extenuation appears, no other proof of malice need be given; the malice is proved by the act, and a conviction of murder must necessarily follow. It is an act done *malo animo*, and without excuse or justification which can be proved.

In the above statement, the case of a killing without provocation is put. But I think it will manifestly appear, from a great variety of cases, that this is equivalent to saying, that it is where no provocation appeareth; where none is proved; on the well-known rule, that facts alleged, but not proved, are considered, for all judicial purposes, as not existing. This is established by *Legg's case*, Kelyng, 27. One John Legg was indicted for the murder of Robert Wise. "It was upon the evidence agreed, that if one kill another, and no sudden quarrel appeareth, this is murder, as in *Mackalley's case*, 9 Co.

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67 b. And it lieth on the party indicted to prove the sudden quarrel." This was affirmed in the leading case of *The King v. Oneby*, 2 Ld. Raym. 1485, and 2 Stra. 766. It was argued on a special verdict, before all the judges, in the year 1727, and their unanimous opinion was delivered by Lord Raymond, C. J. The case is too long to cite, but I will state several points decided, bearing upon the present question. On the subject of implied malice, it was held, that "killing a man, without a provocation, is murder; as if A meets B in the street and immediately runs him through with a sword, or knocks out his brains with a hammer or bottle." One objection to the verdict was, that the homicide was upon a sudden quarrel, and so but manslaughter; whereupon the court stated the rule thus: "In answer to this objection, I must first take notice, that where a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved to be; and therefore in *Legg's case*, it was agreed upon evidence, that if A kills B, and no sudden quarrel appears, it is murder; for it lies upon the party indicted to prove the sudden quarrel."

There is another view of the subject, which appears to me to lead strongly to the same conclusion. I allude to the cases of special verdicts and judgments thereon. It is a settled rule, and was so laid down in *Oneby's case*, to which all the judges agreed, that the court are judges of the malice, and not the jury; and that the court are also judges of the facts found by the jury, whether, if the quarrel was sudden, there was time for passion to cool, or whether it was deliberate or not. It is an equally well-settled rule, that if, upon all the facts, found and returned by the jury, in a special verdict, the accused may be not guilty, the court will take nothing by intendment, and are bound to pronounce him not guilty.

If the fact of killing did not necessarily imply malice, and exclude the inference of heat of blood on provocation, or in mutual combat, then it would follow that, after the fact of killing is found, if the jury do not negative such fact of provocation or mutual combat, it would still be left equivocal, whether the homicide was upon malice or heat of blood, and the court could not render a judgment as for murder. But it is believed, that in *Mawgridge's case*, Kelyng, 119, and in *Oneby's*, and many other instances of special verdicts, the jury do not in terms find that the homicide was of malice, nor do they return, negatively, that there was no provocation or sudden quarrel. They return the facts; of course, the *facts proved, and no others*. If, upon these facts, the court conclude that there was a homicide with malice, judgment is entered for murder; because, whether malicious or not is matter of law. So if, upon the verdict of the jury, no fact of provocation or sudden quarrel appears, it is because no such fact was proved to their satisfaction. The reason why the court are

bound to render judgment for murder, when the verdict neither finds nor negatives the fact of provocation or sudden quarrel, is, that in the absence of proof of these facts, the law presumes malice, from the act of killing, unless the matter of excuse or extenuation affirmatively appears; and unless it does so appear upon the proof in support of the provocation, it must be proved by the accused; otherwise it will not appear at all. It follows, therefore, that in such case, if the accused does not or cannot offer proof of such fact, satisfactory to the jury, his defence on that ground must fail. This is clearly stated by the court in *Oneby's case*, in 2 Ld. Raym. 1494, where the court say: "Although there are many special verdicts in indictments for murder, there never was one where the jury find, in express terms, that the act was done with malice, or was not done with malice pre-pense, or that it was done upon a sudden quarrel and in transport of passion, or that the passion was cooled, or not cooled, or that the act was deliberate, or not deliberate; but the collection of those things from the facts found is left to the judgment of the court." *Holloway's case*, Palm. 545; Cro. Car. 131; W. Jon. 198. So in another passage in the same opinion, being a comment upon *Legg's case*, before cited, it is said: "If A kills B, and no sudden quarrel appears, it is murder; for it lies on the party indicted to prove the sudden quarrel; and therefore the jury not having found any such thing for the prisoner's benefit, it is to be took there was no such."

From this view of the immemorial usage of the courts, upon special verdicts, it appears manifest that the fact of killing is *prima facie* evidence of malice, and unless overcome by preponderating proof the other way, it must be held murder, and judgment go accordingly.

This view of the law of homicide, showing how a judgment must be rendered upon a special verdict which finds, in terms, neither the fact of malice nor the fact of provocation or sudden quarrel, (including, of course, the nature and incidents of such provocation or quarrel,) in extenuating the homicide, leads to the consideration of another part of the direction to the jury, excepted to by this motion. This direction was, that if, in their opinion, the proof preponderated against the conclusion that there was mutual combat, although they might entertain some doubts, then the extenuation was not proved.

The argument against this proposition is this, that as it is a maxim of the criminal law, in favor of life, of innocence, and of immunity from punishment, that the guilt of the accused must be proved to the full satisfaction of a jury, and if they have reasonable doubts on the subject, the defendant ought to be acquitted; then if the proof of the fact of extenuation is such as to raise a reasonable doubt, whether there was not such sudden quarrel as to extenuate the homicide, the jury ought to find a verdict for the lesser offence; otherwise the

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defendant might be convicted of the higher offence, whilst in fact the jury would have doubts whether he was guilty of it. This is putting the objection strongly, and it is certainly entitled to a respectful consideration. But we think it is not well founded. The maxim is certainly a humane and a sound one, and constantly practised on, that guilt must be proved beyond reasonable doubt. In the language of that humane judge, Lord Hale, *tutius semper est errare in acquiando quam in puniendo; ex parte misericordiæ, quam ex parte justitiæ*. But we think the argument drawn from it, on this occasion is not valid. It is the guilt of the accused, which is to be proved to the satisfaction of the jury, and beyond reasonable doubt. Now, if we are right in the main point, which we have been endeavoring to establish, his guilt is proved by proof of the act of voluntarily killing another, without excuse or justification apparent upon the proof offered in support of the prosecution. Unless this fact is proved beyond reasonable doubt, unquestionably the defendant is entitled to an acquittal. But when this is proved beyond reasonable doubt, the guilt of malicious homicide is proved beyond reasonable doubt, and the humane maxim of law is not violated. But it is in favor of life and innocence, that this maxim of criminal law, in the application of evidence, has been adopted; and therefore it was, that in the other branch of the instruction, the court directed the jury to find for the prisoner, if, in their opinion the proof *preponderated* in favor of the fact of sudden and mutual combat. Proof beyond reasonable doubt is necessary to establish a fact against the accused; but preponderating proof—proof sufficient to satisfy a jury of the fact—is sufficient to establish a fact in his favor. But it must go to this extent; otherwise there is nothing on which the jury can found their belief, and warrant them in considering the fact proved. It is not sufficient, therefore, to raise a doubt, even though it be a reasonable doubt, of the fact of extenuation; simply because it is no *proof* of the fact. And here, again, we think the point may be illustrated by considering how the case would stand on a special verdict. Supposing the jury were to find, in the usual form, that the accused made the felonious assault on the deceased with a dangerous and deadly weapon, called a dirk knife, and therewith gave him one mortal wound, of which he instantly died, in manner and form, &c.; and should also return, that there was some evidence tending to prove that said wound was given in heat of blood, during a sudden and mutual combat; but that the proof of such fact did not preponderate over the proof against it, though it raised some doubt in their minds. It seems to us that it must be then considered that the matter of extenuation was not proved; and then, as in very many precedents, the judgment of the court must be against the prisoner, for the higher offence.

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And yet that would be precisely similar to the present case, with this difference, that in this case, the jury were directed to draw the inference as they should find the fact upon the proof; whereas, in the case supposed, the inference would be drawn by the court, on the same state of the case on the record.

I am aware that Lord Holt, in his elaborate opinion, in *Mawgridge's case*, Kelyng, 119, in some introductory remarks, states the ancient law in regard to murder and homicide, in the time of the Danes, and afterwards of the Normans, in which certain arbitrary presumptions were, by express enactment, to be raised. Homicide was not then considered murder, unless it was secret. Among other extraordinary provisions, it is stated that, before the statute of Marlbridge, as the law stood or was interpreted, if a man was found to be slain secretly, it was always intended, 1st, that he was a Frenchman; 2d, that he was killed by an Englishman; 3d, that the killing was murder; and 4th, that if any one was apprehended to be the murderer, he was to be tried by fire and water, (i. e. by ordeal,) though he killed him by misfortune; which was extended beyond reason and justice, in favor of the Normans. These are undoubtedly cases of mere arbitrary presumptions, for the security of despotic power, rather than the dictates of reason and justice. But they are mentioned rather as curious matters of remote antiquity, explaining the origin of the word "murder," than as the basis or origin of any modern rule of law. And Lord Holt, in the same opinion, adds: "It appears, that since the time of Bracton," (who had described murder to be distinguished from manslaughter only by being done secretly, *clanculo*,) "the notion of murder is much altered, and comprehends all homicides, whether privately or publicly committed, if done by *malice prepensed*." In the same elaborate opinion, Lord Holt states the law, it is believed, as it is now understood and practised. "Malice," he says, "is a design formed of doing mischief to another; *cum quis data opera male agit*, he that designs and useth the means to do ill is malicious." "He that doth a cruel act voluntarily doth it of malice prepensed. If one doth such a mischief on a sudden, that is malice prepensed; for, saith my Lord Coke, if it be voluntarily, the law will imply malice. Therefore, when a man shall, without any provocation, *stab another with a dagger*, or knock out his brains with a bottle, this is express malice; for he designedly and purposely did him the mischief. This is such an act that is malicious in the nature of the act itself, if found by a jury, though it be sudden, and the words *ex malitia præcogitata* are not in the verdict." Kelyng, 127.

And in the opinion of the judges, in *Oneby's case*, in 1727, 2 Ld. Raym. 1487, they say, "without entering into a nice examination of

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the several definitions or descriptions of murder, as they are found in the old law books of Bracton, Britton and Fleta, where the wickedness of the act is aggravated by the circumstances of secrecy or treachery; murder has been long since settled to be the voluntary killing a person of malice prepense, and that whether it was done secretly or publicly."

An instance of arbitrary presumption, created by positive law, by an English statute, designed to prevent the growing evil of infanticide, in certain cases enacted that, if a woman should conceal the birth of her bastard child, and afterwards the child should be found dead, it should be presumed that the child was born alive, and that she killed it. This statute was afterwards repealed.

But if we are right in tracing the principle and the true ground of the rule, which seems to be so well established by authority, it is not like an artificial presumption, established by positive law, on considerations of policy; nor like an arbitrary edict of an invading sovereign, jealous of his newly-conquered and still exasperated subjects; but an instance of an inference, drawn by correct reasoning, from facts proved, which must stand until controlled or rebutted by some other fact proved. That such is the principal and foundation of this rule, I have offered some standard authorities to prove; and it remains only to show how uniformly this rule has been repeated, and enforced and acted upon, both by judges, and text writers of established authority.

I have already cited the leading passage in Foster's Crown Law. But the principle is recognized, rather than formally stated, in various passages of that work. "I have already premised, that whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of his jury. The presumption of law is against him, till that presumption is repelled by contrary evidence." p. 290. And again, in p. 313: "for all voluntary felonious homicide without a provocation is undoubtedly murder."

Lord Hale says, "when one voluntarily kills another without any provocation, it is murder; for the law presumes it to be malicious, and that he is *hostis humani generis*." 1 Hale, P. C. 455. In 1 Hawk. c. 31, § 32, it is laid down, that "wherever it appears that a man killed another, it shall be intended, *prima facie*, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, &c." In 4 Bl. Com. 201, it is said, "we may take it for a general rule, that all homicide is malicious, and of course amounts to murder, unless where justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury; the latter of

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whom are to decide whether the circumstances alleged *are proved* to have actually existed; the former, how far they extend to take away or mitigate guilt." In 1 East, P. C. 224, 340, it is laid down, that "the fact of killing being first proved, the law presumes it to have been founded in malice, unless the contrary appear; and all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. Upon the truth of these facts, so alleged, the jury alone are to decide; but whether, taking them to be true, the homicide is justified, excused or alleviated, is matter of law, upon which the jury ought to be guided by the direction of the court." The law is stated, in nearly the same terms, in 1 Russell on Crimes, (1st ed.) 614-616. It is there said, that "it is incumbent upon the prisoner to make out such circumstances" of alleviation, &c. The following books are to the same effect. Bac. Ab. Murder, C. 2; 2 M'Nally, 546; 2 Stark. Ev. 948; Archb. Crim. Pl. (1st ed.) 212, 213; 3 Chit. Crim. Law, (4th Amer. ed.) 727; Roscoe, Crim. Ev. (2d ed.) 20, 653; 1 Gabbett, Crim. Law, 455.

In *The Queen v. Kirkham*, 8 Car. & P. 116, 117, Coleridge, J., says: "As soon as it is ascertained that one individual, in the possession of his reason, has wilfully taken away the life of another, the law's first presumption is, that the party is guilty of murder." "The law requires from him and will allow him to show that there were some mitigating circumstances, which alter the presumed character of the act."

I will cite only one other recent English case, to show how uniformly this rule of law is applied there, in like cases. In *The King v. Greenacre*, 8 Car. & P. 35, the question was whether the offence was murder or manslaughter. The homicide was committed in secret. Lord Chief Justice Tindal told the jury thus: "There are several principles of law relating to this subject, one of which is perfectly clear, viz., that, where it appears that one person's death has been occasioned by the hand of another, *it behooves that other to show* from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder."

This rule has been adopted and sanctioned, almost in the same terms, in this Commonwealth, and in several of the States. In *The Commonwealth v. Phillips*, in this county, in the year 1817, Parker, C. J., thus laid down the law: "When a homicide is committed, the law implies malice. It is incumbent on the person who committed it to prove the absence of malice, by evidence produced in his defence; or the proof may arise out of the evidence on the part of the government." Pamphlet report of Phillips's trial, p. 45.

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So in New York; *The People v. McLeod*, 1 Hill, 436; and in New Jersey; *The State v. Zellers*, 2 Halst. 243. So in Pennsylvania, by the common law. *Pennsylvania v. Honeyman, Bell, McFall and Lewis*, Addison, 148, 161, 257, 282. Since the statute of that State, passed in 1794, the burden of proof is on the government; and unless the circumstances of malice are proved, it is murder only of the second degree. 1 Whart. Dig. (4th ed.) 327.

I have thus endeavored to establish the proposition, and it seems to be most abundantly proved, that when the fact of voluntary homicide is shown, and this not accompanied with any fact of excuse or extenuation, malice is inferred from the act; that this is a fact which may be controlled by proof; but the proof of it lies on the defendant; and if not so proved, it cannot be taken into judicial consideration. This is expressed in a variety of forms, a variety so great as to preclude the supposition that it depends upon a form of words or mode of expression transmitted by one writer or jurist to another, but recognized, for a long series of years, as a rule of judicial decision founded on the principles of evidence, and confirmed by a long course of practice.

In *Legg's case*, the words are, "*it lieth upon the party indicted to prove the sudden quarrel.*" So in *Oneby's case*, "where a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved so to be." Foster says, the defendant "must prove his case to the satisfaction of his jury. The presumption of law is against him, *till it is repelled by contrary evidence.*" Blackstone says, "it is *incumbent on the prisoner to make out,*" &c. East says, the circumstances "are to be satisfactorily *proved by the prisoner.*" Starkie says, the defendant "must *prove his case.*" Coleridge, J., says, "the law *requires from him to show,*" &c. Tindal, C. J., says, "*it behooves him to show,*" &c.

These various expressions we consider as meaning substantially the same thing. Now whether it be regarded as a presumption, to be rebutted by proof, or a change of the burden of proof, or an inference of fact, to be controlled or disproved by evidence, as applied to this subject, it makes little difference. It is evidence of malicious homicide, which must have its effect, until the malice is disproved by satisfactory proof of circumstances of extenuation. It is hardly necessary to cite authorities to the very familiar principle, that when a fact is to be proved, it must be by evidence sufficient to lead a jury to believe it to be true; and that, for this purpose, it must outweigh or overbalance the evidence which it is brought to control. I will simply allude to two recent cases of great interest, in this court. In *The Commonwealth v. J. F. Knapp*, 9 Pick. 496, the prisoner was charged with aiding and abetting in the murder of Mr. White. The proof

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tended to show that the prisoner conspired with the perpetrator of the murder, and was in a situation to afford encouragement and assistance, though standing at some distance from the scene. The court instructed the jury, that if the prisoner was one of the conspirators, and in a situation to afford some assistance, it would follow, as a legal presumption, that he was there to carry into effect the concerted crime; and that it would be for the prisoner to *rebut that presumption*, by showing to the jury that he was there for another purpose.

In *The Commonwealth v. J. J. Knapp*, 10 Pick. 484, the principle is laid down more explicitly. The prisoner was charged as accessory before the fact to the same murder; and it became necessary to prove the conviction of the principal. The record was offered for that purpose and objected to. The court admitted it as *prima facie* evidence, saying, "it may be rebutted by showing that there was no murder, or that Francis was not in a situation where he could take a part as a principal. The prisoner has the burden of proof. He must show the jury that Francis ought not to have been convicted. He is not to make the propriety of the conviction *questionable* merely; he must prove it to have been clearly wrong."

These cases, it is believed, were deliberately tried, and the rules of law laid down in them were much considered; and the passages I have cited are directly in point. In both cases, it was held, that where a presumption against the accused was established, or a *prima facie* case made, it must stand as a fact proved, till overthrown by proof of the contrary. In the last case, proof of murder committed, and the prior conviction of the principal, were essential averments to be proved; but the record of the conviction was held *prima facie* evidence of that murder, unless proved by the defendant to be wrong. Proof making it *questionable* would be insufficient.

This is precisely conformable to the direction, in the case at bar, that when the state of the proof is such, that it becomes necessary for the accused to take on himself the proof of a fact, it will not be sufficient to make it doubtful or questionable; it must preponderate.

When it is said that the proof lies on the accused, it is not to be understood that the evidence must be adduced or offered by him; he may avail himself of all the evidence, on both sides, whether produced by himself, or coming from the other side on direct or cross-examination. The true meaning is, that the accused takes the responsibility of that fact, and if the proof does not sustain it, the legal conclusion is that it is not true, and he cannot have the benefit of it, as a fact proved.

If it be still insisted, that conformably to this course of reasoning, a person on trial may be convicted of the higher offence when the jury

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have doubts whether he ought to be so convicted, we think the answer is obvious. The crime, the *corpus delicti*, is to be proved beyond reasonable doubt; otherwise the accused is entitled to an acquittal. The jury must be so instructed, and were so instructed in the present case. If the homicide was proved beyond reasonable doubt, and no fact of extenuation came out with the proof of the homicide, (and we are now so to presume,) then the offence of which the party was convicted was proved beyond reasonable doubt, and the doubt arises only in regard to a fact which was alleged by the accused in extenuation, but not proved. This would, perhaps, appear more clear, in a case where there is no medium between acquittal and conviction, as there is in homicide, by a verdict of manslaughter. Suppose a party indicted for manslaughter, and that the defence should be excusable self-defence. Suppose the fact of killing should be clearly proved, but an attempt to prove a previous violent attack upon him by the deceased should fail, although the evidence might tend to raise some doubt whether there was not such previous attack. The conviction, in such case, must rest on proof establishing the *corpus delicti* beyond reasonable doubt, although the whole evidence would raise a doubt, whether there had not been such previous attack. The proof establishing the necessity for such taking of life, in self-defence, must be satisfactorily made out. Raising a doubt would be insufficient.

So in *J. J. Knapp's case*, the jury might have entertained great doubts of the correctness of the conviction of the principal; but being established by proof, sufficient until met by proof sufficient to prove it incorrect, the jury were rightly directed to convict him, because such proof was not given.

The other branch of the direction given to the jury, that in case of the proof being equal, the presumption of innocence would turn the rule in favor of the prisoner, was favorable to the accused, and could not be and has not been objected to by him. It may deserve a fuller consideration when it again arises.

On the principal question, upon the fullest consideration we have been able to give it, on this revision, a majority of the court are of opinion that the direction was right, and that the motion for a new trial must be overruled.

WILDE, J. I regret exceedingly that the court have not been able unanimously to concur in opinion, on the important question raised by the motion of the prisoner's counsel. In the administration of justice, it is of great importance that the law and the rules of evidence should not only be founded upon just and reasonable principles, but that they also should be clearly settled. Any uncertainty of the law is a great evil, and may be productive of great injustice. This is

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true in all cases, civil or criminal, but more especially in capital cases, when the life of a fellow-being may depend on a principle of law or a rule of evidence.

Impressed with these considerations, and with the vital importance of the question in this case, I have examined the authorities on which it depends with great care and attention; and notwithstanding my great deference to the opinions of my learned brethren, in doubtful and difficult questions, I cannot conscientiously concur in the decision now pronounced by the Chief Justice. I am unable, after the most anxious consideration of the question, to overcome the strong conviction of my own mind, that the instructions excepted to are not maintainable upon any sound principle of law, or upon any binding authority. I feel therefore in duty bound to express my own opinion, and to refer briefly to the authorities and principles of law upon which it is founded.

In my opinion, the question depends entirely upon the rule of law as to the burden of proof. If the burden of proof throughout the trial was on the Commonwealth, the instructions to the jury were clearly incorrect; if, on the contrary, it was on the prisoner, after the proof of the homicide as charged, he has no ground of exception; as the instructions were more favorable to him than the law requires. That the burden of proof was on the government, in the first instance, to prove all the essential facts alleged in the indictment, cannot be controverted; but the counsel for the Commonwealth contends, that the homicide having been proved as charged, the law presumes malice, and consequently that a *prima facie* case for the government was fully proved, and thereupon the burden of proof shifted, and was thrown on the prisoner, to make it appear that the homicide was excusable, or was committed on such a provocation as would be sufficient to reduce the crime to manslaughter.

This argument cannot be maintained, unless the law of homicide, as to the burden of proof, is an exception to the well-established rule of law in all other cases. Even in a civil suit, the plaintiff must prove all the essential allegations in his writ, beyond a reasonable doubt, or the defendant is entitled to a verdict. This just rule is of great importance in the trials of civil actions, where the evidence is doubtful; it is still more important in criminal trials, and most of all in capital trials. The *prima facie* evidence of a case never changes the burden of proof, unless the defence is founded on the admission of the facts proved by such evidence. And in criminal cases, the burden of proof never shifts, so long as the defendant grounds his defence on the denial of any essential allegation in the indictment. For instance; if the prisoner, in the present case, had grounded his defence on the proof of an *alibi*, and the jury had doubted whether to

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believe the witnesses testifying to his guilt, or the witnesses testifying to an *alibi*, undoubtedly the jury would have been bound to return a verdict of acquittal, notwithstanding the government, in the first instance, had made out a *prima facie* case by express evidence. And how can the principle vary when a *prima facie* case is made out partly by presumption? If, on the whole evidence, the jury had a reasonable doubt of the prisoner's guilt as charged, they could not be justified in convicting him.

In the case of *The Commonwealth v. Dana*, 2 Met. 329, the defendant was indicted for having in his possession lottery tickets, with an intent to sell or offer them for sale; and the jury were instructed that "if, from the whole evidence on the part of the Commonwealth, they were led to the belief that the defendant did sell and deal in lottery tickets, and had them in his possession for that purpose, they would be authorized to find him guilty, unless he had succeeded, on his part, as had become his duty, to explain those facts and circumstances consistently with his innocence of that unlawful intention." To this charge the defendant excepted, and the exception was overruled; but not on the ground, as was understood by the counsel for the Commonwealth, that the burden of proof was thrown on him. The court say, "this is not the meaning of the charge; for the jury were instructed that they were not authorized to find the defendant guilty, unless the evidence was such as to lead them to believe that he was guilty. The remark, that it was the duty of the defendant to explain the facts and circumstances proved against him, consistently with his innocence, meant no more than he ought so to do; but still if he failed, they were not to find a verdict against him, unless, on the whole evidence, they believed him guilty. If they doubted, they were to acquit him. So the case was left to the jury on the right footing, namely, that the burden of proof was not shifted, but still remained on the Commonwealth, to prove the guilt of the defendant; and if a reasonable doubt remained, the defendant was to be acquitted." The rule was thus laid down in *Powers v. Russell*, 13 Pick. 76, 77: "When the proof on both sides applies to one and the same issue or proposition of fact, the party whose case requires the proof of that fact has, all along, the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and distinct proposition, which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." See also *Sperry v. Wilcox*, 1 Met. 270, and *Brown v. King*, 5 Met. 181. Various other authorities

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might be cited in support of the rule laid down in these cases ; but it is unnecessary. I consider the rule of law as clearly settled ; and it is founded on the plainest principle of reason and justice. Most certainly, when a party is charged with the commission of any crime, all the facts constituting the crime must be proved against him ; and if, on the whole evidence, the jury have a reasonable doubt as to any one of such facts, they are bound to acquit him. The jury are sworn to give a true verdict according to the evidence ; not according to the presumption of any fact, unless it is a natural and reasonable inference from some other facts proved.

In the case of *Coffee v. The State*, 3 Yerger, 283, it was decided, that malice being a necessary ingredient in constituting the crime of murder, if the jury had a reasonable doubt of the malicious intent with which the act was done, that doubt must weigh in favor of the prisoner ; and unless removed by the government, they must acquit him. " I am of opinion," says Green, J., " that the judge should have told the jury that if, upon the whole circumstances of the case, they were satisfied of his [the prisoner's] guilt, they ought to find him guilty ; but if their minds, taking all the evidence together, could not come to any satisfactory conclusion as to whether the act amounted to murder or manslaughter, they ought to find him guilty of manslaughter only."

These principles and authorities are wholly irreconcilable with the presumption of malice on which the counsel for the Commonwealth relies. No malice can be inferred from the mere act of killing. Such a presumption, therefore, is arbitrary and unfounded. Many homicides are committed in self-defence, some by accident, and many more upon a sudden provocation, or in mutual combat. How then can it be maintained, upon any just or reasonable principle, that every homicide implies malice, unless the contrary be proved beyond a reasonable doubt ? Nor is such a presumption supported, as it seems to me, by any binding authority. It had its origin in a barbarous age, when the rules of evidence, as now established, were little known, or very much disregarded. Depositions of witnesses not permitted to be confronted with the prisoner, and written examinations of accomplices, and their confessions, proved by hearsay evidence, were all considered competent proof, by very learned judges, in the most solemn trials. Such was the unsettled state of the law, as to the admission and effect of evidence, when the presumption in question had its origin, and indeed for several centuries after. At that time, the crime of murder was confined to the secret killing of another, which the word *moerda*, says Judge Blackstone, signifies in the Teutonic language. " It was defined, *homicidium quod nullo vidente, nullo sciente clam perpetratur* ; for which the ville wherein it

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was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated *murdrum*. This was an ancient usage among the Goths in Sweden and Denmark; and, according to Bracton, was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans." 4 Bl. Com. 194, 195. The same account of these ancient laws is given by Lord Holt, in *Regina v. Mawgridge*, Kelyng, 122. Before the statute of Marlbridge, he observes, "If a man was found to be slain, it was always intended, 1st, that he was a Frenchman; 2d, that he was killed by an Englishman; 3d, that the killing was murder; 4th, if any one was apprehended to be the murderer, he was to be tried by fire and water, though he killed him by misfortune; which was extended beyond reason and justice in favor of the Normans." These ancient laws or ordinances were abolished by St. 14 Edw. III. c. 4; since which, murder has been defined as it now is, "without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction." 4 Bl. Com. 195; Staunf. P. C. 18; 1 Hale, P. C. 447.

Such is the origin of the presumption relied on in support of the conviction of the prisoner; a presumption founded on no just principle, but on arbitrary ordinances which have been long since abolished, and which is opposed to a fundamental and a most important principle of the criminal law, that in all cases, where the guilt of the accused is left doubtful by the evidence, the presumption of innocence is to prevail in his favor. And so, if it be doubtful whether he be guilty of a greater or less offence, he is only to be convicted of the latter. But if the presumption of malice, from the mere act of killing, had ever any foundation in justice or sound policy, it must be confined to secret homicides, as it was originally, and cannot be extended to cases where the facts and circumstances attending the homicide are proved, and the existence of malice, from the whole evidence, is left doubtful.

On principle, this appears to me exceedingly clear; and I think there is no binding authority to the contrary. The *dicta* of judges, referred to in the digests, were extrajudicial. They are to be found in cases decided on special verdicts, where the question of malice depended upon the facts and circumstances found by the jury, from which it might or might not be inferred. Such was the decision in *The King v. Oneby*, 2d Ld. Raym. 1485, and 2 Stra. 766. There was no question as to the burden of proof in that case; for the question of malice was expressly decided on the facts found by the jury.

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The court say, that "upon the trial of an indictment for murder, the judge directs the jury thus: 'If you believe such and such witnesses, who have sworn such and such facts, the killing the deceased was with malice prepense express, or it was with malice implied; and then you ought to find the prisoner guilty of murder; but if you do not believe those witnesses, then you ought to find him guilty of manslaughter only; and so, according to the nature of the case, if you believe such and such facts, the act was deliberate or not deliberate; and then you ought to find so and so.' And the jury may, if they think proper, give a general verdict, either that the prisoner is guilty of murder, or of manslaughter. But if they decline giving a general verdict, and will find the facts specially, the court is to form their judgment, from the facts found, whether there was malice or not, or whether the fact was done on a sudden transport of passion, or was an act of deliberation or not." 2 *Ld. Raym.* 1494. From these principles it must be inferred, that whatever may have been the opinion of the court as to the presumption of malice, from the mere act of killing, in cases of secret homicides, they were nevertheless of opinion, that when there was evidence as to the manner of killing, and the facts and circumstances attending the act, the question of malice was to be decided upon those facts and circumstances, whether decided by the jury, or by the court upon the facts specially found. Now, if the jury, in the present case, had found a special verdict in conformity with the instructions of the court, it would have been, that the prisoner was guilty of the homicide charged; but whether it was committed with malice prepense, or in the heat of blood on some provocation, or in mutual combat, was doubtful, although, by the preponderance of the evidence, the crime was committed with malice. It is very clear that such a verdict could not be received, as no judgment could be rendered upon it; a material fact not having been found. And this I consider a test of the soundness of the presumption contended for in behalf of the prosecution. For if the burden of proof is on the prisoner, to reduce the crime from murder to manslaughter, and the jury find that he has failed so to reduce it by satisfactory evidence, but that the presumption of malice and the preponderating proof concur, the court would be authorized to sentence the prisoner as convicted of the crime of murder; which I hold clearly the court would have no authority to do.

If then there is any ground for the presumption in question in cases of secret homicides, there is none whatever in cases where there is evidence as to the facts and circumstances accompanying the act of killing. In all such cases, the jury are to decide upon the question of malice, according to the facts and circumstances proved. Malice is implied, says Sir Michael Foster, when the fact of killing "hath

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been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty, and fatally bent upon mischief." And all the authorities agree, that when such facts and circumstances are proved, the law implies malice; which certainly is a just and reasonable implication. But why is malice implied from facts and circumstances indicating a wicked and depraved heart, when malice is presumed from the mere act of killing? If the secrecy of the act may raise the presumption of malice, such a presumption has no application to cases in which the facts and circumstances accompanying the act are proved; and no case can be found, in which such a presumption has been so applied. This presumption of malice, from the mere act of homicide, is not sanctioned either by Lord Coke or Lord Hale. Lord Coke lays down the doctrine, as to the implication of malice, very fully. Malice, he says, is implied in three cases; 1st. In respect of the manner of the deed; as if one killeth another without any provocation on the part of him that is slain, the law implieth malice. 2d. In respect of the person slain; as the killing of an officer in the due execution of his duty. 3d. In respect of the person killing; as if A assault B, to rob him, and in resisting, A killeth B, this is murder by malice implied. 3 Inst. 52. The same doctrine is laid down by Lord Hale. "When one voluntarily kills another, *without any provocation*, it is murder; for the law," says he, "presumes it to be malicious, and that he is *hostis humani generis*." 1 Hale, P. C. 455. Neither of these eminent judges and learned writers on criminal law takes notice of any presumption of malice from the mere act of homicide.

On the other hand, it is true that Sir Michael Foster, an eminent judge certainly, and a learned writer on criminal law, does lay down, in his discourse on homicide, the doctrine of presumption as now contended for on behalf of the Commonwealth. But the only case cited in support of the doctrine is *The King v. Oneby*, which was decided on a special verdict upon the facts and circumstances accompanying the killing, and not on any presumption of malice from the act itself. This opinion of Sir Michael Foster, which has principally given currency to the doctrine contended for by the counsel for the Commonwealth, is supported only by a few *dicta* of judges, which, as it seems to me, are founded on no just principle. Blackstone, in his Commentaries, says, "all homicide is presumed to be malicious, until the contrary appeareth upon evidence." 4 Bl. Com. 201. But Foster's discourse on homicide is alone cited in support of the presumption. East, in his treatise cites Foster and Hale; but the latter, as already remarked, does not support the doctrine. 1 East, P. C. 224. Russell, in his treatise, lays down the same rule of presumption, but cites only

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Blackstone in its support. 1 Russell on Crimes, (1st. ed.) 615. Roscoe, on Criminal Evidence, cites East & Hale, and also 8 Car. & P. 35. But the case in Car. & P. was one of secret homicide, and there was no evidence that the prisoner was the guilty party, except from his own statements. In the same volume, p. 22, (*The King v. Morrison*,) a prisoner was indicted and convicted of manslaughter, simply on his admission, on being arrested, that he was the person who killed the deceased. Park, J., in his instructions to the jury, said, "the death of man, if it be shown to have been occasioned by the prisoner, will be murder or manslaughter, as the circumstances may turn out, unless it is shown by the prisoner to have been occasioned by accident." And this is the doctrine contended for by the prisoner's counsel, in the present case. In this case, the facts and circumstances accompanying the homicide were proved, and the jury were bound to decide the question, whether the crime were murder or manslaughter, according to the evidence, without any regard to the presumption relied on in support of the prosecution.

Taking into consideration all these authorities and *dicta*, and the statements of the law of homicide by the writers on criminal law, I am of opinion that the following conclusions are maintained on sound principles of law and manifest justice: 1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing. 2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him. And, consequently, that the instructions to the jury, in the present case, on the question of malice, were erroneous. In my opinion, the jury should have been instructed, that the burden of proof was on the government, and that the prisoner could not be legally convicted of the crime charged, unless they were convinced, beyond a reasonable doubt, that he was in fact guilty of that crime; that a preponderance of the evidence, if a reasonable doubt remained, was not sufficient; and that the question of malice was to be decided on the facts and circumstances accompanying the homicide, and not on any presumption from the mere act of killing.

I am therefore constrained to say, with great deference to the opin-

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ion of my learned brethren, that, in my judgment, the prisoner is entitled to a new trial.

No reported case can be found in England or America in which the law of implied malice is so thoroughly discussed, as in *York's case*; and whether the doctrine of the majority or the minority of the court finally prevails, the case itself well deserves the name of a leading case on this branch of the law.

The rule laid down by a majority of the court was reaffirmed by the same court in the subsequent case of *The Commonwealth v. Webster*, 5 Cushing, 305, (1850), in these words:—"The implication of malice arises in every case of intentional homicide; and the fact of killing being first proved, all the circumstances of accident, necessity, or informality, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. It is material to the just understanding of this rule, that it applies only to cases where the killing is proved, and *nothing further is shown*, for if the circumstances disclosed tend to extenuate the act, the prisoner has the full benefit of such facts." See *The Commonwealth v. Hawkins*, 3 Gray, 465, (1855). The same rule appears to have been substantially adopted in Mississippi. Thus in *McDaniel v. The State*, 8 Smedes & Marshall, 402, (1847), it was held erroneous to charge the jury that every homicide is presumed to be committed with malice aforethought, and that it devolves upon the prisoner to prove the circumstances which excuse the act. "Such a charge," it was said, "is too broad." It omits the important part of the rule as stated in the books, unless they arise out of the evidence produced against him. But where the

fact of killing is proved, and no accompanying circumstances appear in the evidence, the law presumes the killing was done maliciously." So in *Mitchell v. The State*, 5 Yerger, 340, (1833), it was held that the fact of killing being proved, the law presumes that it was malicious, and that it was incumbent on the defendant to show, by proof, matter in alleviation, or that it was a less offence.

The opinion of the majority of the court in *York's case* is met with so great force of reasoning in the dissenting opinion of Judge Wilde, that if the former is erroneous, it carries with it its own antidote. The whole subject is so ably presented upon both sides in the several opinions, as to leave little to be added in this place. The reader will notice that *York's case* does not merely declare that killing with a *deadly weapon* is presumed to be murder, unless explained or extenuated, but that *the mere fact of the production of death*, even without any weapon at all, gives rise to such indisputable presumption. There may be good reason, as well as authority, for holding that a killing with a *deadly weapon*, in the previous possession of the party using it, should be presumed to be a premeditated killing, and therefore murder, unless the contrary be made to appear. Such a presumption would not do so much violence to our nature, as some others. It is well supported by our experience and observation. Reason points to it as a natural, reasonable conclusion; as a fair logical inference from the admitted premises. It has therefore received the sanction of many ancient and modern authorities. 1 Hale, P. C. 440; 1 Greenleaf, Evidence, § 18; *The Commonwealth v. Hill*, 2 Grattan, 594, (1845); *Woodside v. The State*, 2 Howard, 656, (1837); *Oliver v. The State*, 17 Alabama, 587, (1850); *Bivens v. The State*, 6 English, 455, (1850.) It is also to be observed that the opinion of the majority in *York's case* is, not that a murder is to be legally inferred from the proof of a *voluntary* or

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wilful killing, (about which, also, different opinions may be honestly entertained,) but that such inference is to be drawn from the *simple fact* of killing, without the slightest evidence whether the homicide was accidental, or intentional, aggressive, or in self-defence. Of course, upon that view of the law, if A says, "I have killed B," and there be no evidence tending to show how or why it was done, it is conclusively to be presumed, as a matter of law, that the act of killing was an act of murder. So, too, it is to be noted, that *York's case* determines not only that a simple act of killing is to be presumed *unlawful*, (which may be so, until the contrary is proved,) but that it is to be presumed unlawful in the *highest degree*. The steps, therefore, necessary to arrive at the final conclusion of the court in this remarkable case, are, *First*; That a mere act of killing, unexplained, is presumed to be intentional and wilful, and not the result of accident or negligence. *Second*; That an act of killing, unexplained, being presumed to be intentional, shall also be presumed to be *unlawful*, and not in self-defence. *Third*; That an act of killing, unexplained, being presumed to be intentional and unlawful, shall also be presumed to have been done deliberately, and with premeditation, and not from any sudden provocation, or in mutual combat. But is not this mode of reasoning open to the objection of drawing a presumption from a presumption, or founding one presumption upon another presumption, which, according to the well-established rules concerning presumptions, cannot be done. *Richmond v. Aiken*, 25 Vermont, 324, (1853); *Pennington v. Tell*, 6 English, 212, (1850.)

The question which prominently presents itself in reading *York's case*, is, what is meant by the word *malice*? Is it any thing more, or any thing less than the criminal intent, the *malus animus*, the wrongful motive which must exist to make any act criminal? If that be the true meaning of the term, there are many cases where such intent is and must be inferred — necessarily inferred — from the bare commission of the act. In the cases of violence upon a female, arson of a dwelling-

house, death by poisoning, and the like, the inference of this criminal intent, from the simple fact, or act committed, is reasonable, is proper, is necessary. The act could not be committed without it. There are no such degrees of rape or arson, that they can become excusable or justifiable. But, as is quite obvious, the case is very different with homicide. That may be either murder, manslaughter, excusable homicide, or justifiable homicide. Now, to argue that from the simple fact of killing, — the bare homicide, — the same rule should be applied as in the case of rape, and that the one should be presumed to be unlawful, because the other is, seems to be reasoning on a false analogy. Violence upon a female may safely be inferred to be *always* unlawful, because under no possible circumstances can it be otherwise. The criminal intent need not be otherwise proved, than by the simple fact, because they are one and inseparable. But homicide may be lawful. It is well known to be so in many cases. In many more it is excusable, or capable of extenuation. And if it may be so, if it often is so, whence the reason, where the justice of attaching to that which may be lawful, an insuperable conclusive inference of law that it is unlawful, and not only unlawful, but unlawful in the *highest degree*; or, murder. Why does not the presumption of innocence attach as much to the motive, the intent with which an act is done, as to the act itself. Innocence means innocent of any *unlawful* act, as well as of any act at all. If the burden of proving the act itself is on the government throughout, is there not the same burden of proving the malicious intent? It is an evasion of the point, to say that the latter is proved, because it is by law inferred from the wrongful act itself. That assumes the very question in dispute, *was the homicide unlawful?* The government asserts it; the accused denies it. The principle that malice is to be legally inferred from the commission of "a wrongful act, done intentionally without just cause or excuse," does not help us in the solution of the question. The question still remains, "Was the homicide *unlawful*? Was it intentional or ac-

Murder — Presumption of Malice — Burden of Proof.

cidental? Was it done without just cause or excuse?" In other cases, criminal malice is not always implied from the commission of a wrongful act. In many States it is made a crime *maliciously* to destroy or injure another's personal property. Yet it is perfectly well settled, that such an offence is not made out by simple proof of a voluntary and wrongful injury to, or destruction of such property. There must be proof of actual malice, ill-will, resentment towards the owner of the animal. *Rez v. Pearce*, 1 Leach, C. C. 594, case; *The State v. Latham*, 13 Iredell, 33; *The State v. Robinson*, 3 Devereux & Battle, 130; *The State v. Pierce*, 7 Alabama, 728; *Regina v. Livey*, 2 Cox, C. C. 99.

A vigorous writer in the North American Review for January, 1851, in an able article on the "Law of Homicide," to which we are indebted for the last illustration, considers that the most equal and exact justice would be meted out, by adopting the rule laid down in South Carolina, in *The State v. Smith*, 2 Strobbart, 77, viz., that if the act of a person, which produces another's death, be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law, from these circumstances, will imply malice, without reference to what was passing in the person's mind at the time he committed the act. Such a principle is supported by reason and the analogies of the law.

But another question arises, as to the ruling of the majority in *York's case*, on another point in that case, which was, not only that the presumption of malice is to be inferred from the act of killing, but that this presumption changed the burden of proof, and that proof of matter of excuse or extenuation was cast upon the defendant. But assuming that the first

named of these propositions is correct, does the latter follow from it? Granting that the presumption of malice arises, and that the presumption is that the act was murder, does that change the burden of proof; using the term in the sense given to it in the note in 1 Leading Criminal Cases, to the case of *The Commonwealth v. McKie*, decided in the same court as *York's case*. Indeed, in a case in the same volume as *York's case*, we find the same court deciding, that the existence of a presumption in favor of the government and against a prisoner, does not shift the burden of proving the fact in dispute, and cast it upon the defendant. *The Commonwealth v. Bradford*, 9 Metcalf, 268. That was an indictment for illegal voting, alleging that the defendant had not resided in the town, when he voted, six months next preceding his voting. Upon proof being offered that he was residing in another town, for a period of seven months before the election, the government claimed, that this being so, the presumption of law was, that all things continued as they were until a change was shown, and that as the defendant could have but one residence at a time, and as a former residence is *presumed* to continue until another is acquired, the defendant was bound to show a change of residence, and the acquisition of a new residence in the place of voting. The court below so ruled, and the defendant was convicted. But upon examination by the whole court, the verdict was set aside, on this point alone. And this case shows conclusively, that the mere existence of a presumption in favor of the Commonwealth does not change the burden of proof, throwing upon the defendant the duty of proving what otherwise he would not be under a legal obligation to prove.

E. H. B.

REGINA v. WILLIAM VAUX.¹

1590.

• *Former Acquittal — Insufficient Indictment.*

A former acquittal upon an insufficient indictment is no bar to a second prosecution for the same offence.

WILLIAM VAUX, at the Sessions of Peace for the county of Northumberland, held 27th Julii, anno 32 Eliz. before the Justices of Peace of the same county, was indicted of voluntary poisoning of Nicholas Ridley, which indictment was removed into the King's Bench: and in discharge thereof the said Vaux pleaded, that at another time, scil. 12 Augusti, anno 30 Eliz. at Newcastle-upon-Tine, in the county of Northumberland, before the Justices of Assise of the same county the said Vaux was indicted: Quod cum Nich' Ridley nuper de W. in com' præd' Armig' jam defunctus, per multos annos, ante obitum suum nuptus fuisset cuidam Margaretæ uxori ejus et nullum exitum habuit, præd' Will' Vaux nuper de K. in com' C. generos. subdole, caute, et diabolice intendens mortem, Venenationem, et destructionem ipsius Nicholai, et Deum præ oculis non habens, 20 Decembris, anno 28 Eliz. apud W. prædict' felonice,² voluntarie, et ex malitia sua præcogitata, persuadebat eundem Nichol' recipere et bibere quendum potum mixtum cum quodam³ veneno vocat'⁴ Cantharides, affirmans et verificans eidem Nich' quod' præd' potus sic mixtus cum præd' veneno vocat' Canth' non fuit intoxicatus (Anglica poison'd) sed quod per reception' inde præd' Nich' exit' de corpore dictæ Margaretæ tunc uxoris suæ procuraret, et haberet ratione cujus quidem persuasionis et instigationis præd' Nich' postea, scil. 16 Januarii anno supradicto' apud T. in com' N. præd' nesciens prædictum potum cum veneno in forma prædict' fore mixt',⁵ sed fidem adhibens predictum persuasioni dicti Willielmi recepit et bibit. per quod prædictus Nicholaus immediate post receptionem veneni prædicti per tres horas immediate sequent' languebat, et postea præd' 16 Jan. anno supradict' ex venenatione et intoxicat' præd' apud T. præd'⁶ obiit: Et sic præd' Will' Vaux felonice et ex malitia sua præcogitata præfat' Nich' voluntarie et felonice modo et forma præd' intoxicavit, interfecit,⁷ et murtheravit, contra pacem, &c. Upon which indictment the said Vaux was arraigned before the

¹ 4 Coke, B. 44.² Cr. Jac. 438.³ 8 Inst. 48.⁴ Palm. 547, 548.⁵ 1 Ventr. 24.⁶ Cr. Jac. 438.⁷ 5 Co. 123, a.

Former Acquittal — Insufficient Indictment.

same justices, and pleaded Not Guilty: And the jurors gave a special verdict, and found, Quod præd' Nich' Ridley venenatus fuit, Anglice poisoned, per receptionem præd' Cantharides, et quod præd' Will' Vaux non fuit præsens tempore quo præd' Nich' Ridley recepit præd' Canth' sed utrum, &c. And thereupon judgment was given by the said Justices of Assise in this manner: Super quo visis, et per Cur' hic intellectis omnibus et singulis præmissis, pro eo quod videtur cur' hic super tota materia per veredictum præd' in forma præd' compert', quod præd' venenatio per reception' præd' Canth' et præd' procuratio præd' Will' ad procurand' præd' Nich' ad accipiend' præd' Canth' modo et forma prout per veredict' præd' compert' fuit, non fuit feloniam et murdrum voluntar': Ideo considerat' est quod præd' Will' Vaux, de feloniam et murther præd' in indictamento præd' superius specificat', necnon de dicta felonica venenatione præd' Nich' Ridley in eodem indictamento nominati eidem Will' imposit' eat sine die: and as to the felony and murder he pleaded Not Guilty.

And first it was resolved *per totam Curiam*, that the said indictment upon which Vaux was so arraigned was insufficient, and principally because it is not expressly alleged in the indictment, that the said Ridley received and drank the said poison, for the indictment is, "præd' Nich' nesciens præd' potum cum veneno fore intoxicatum, sed fidem adhibens dict' persuasioni dicti W. recepit et bibit, per quod," &c. So that it doth not appear what thing he drank, for these words (venenum præd') are wanting, and the words subsequent, "scil. per quod præd' N. immediate post receptionem veneni prædict'," &c. which words imply receipt of poison, are not sufficient to maintain the indictment, for the matter of the indictment ought to be full, express, and certain, and shall not be maintained by argument, or¹ implication, because the indictment is found by the oath of laymen. 2. It was agreed *per curiam*, that Vaux was a principal² murderer, although he was not present at the time of the receipt of the poison, for otherwise he would be guilty of such horrible offence, and yet should be unpunished, which would be inconvenient and mischievous; for every felon is either principal or accessory, and if there is no principal there can be no accessory, quia³ accessorium sequitur, principalem, and if any had procured Vaux to do it, he had been accessory before; *quod nota* a special case, where the principal and accessory also shall both be absent at the time of the felony committed. 3. It was resolved by the Lord Wray, Sir Thomas Gawdy, Clench and Fenner, Justices, that the reason of *auterfoits acquit* was, because where the

¹ Stamf. Cor. 90 a, b.² 2 Inst. 183; 3 Inst. 48, 198; 9 Co. 81 b; Jenk. Cent. 290.³ Co. Lit. 152 a; Palm. 334; Latch. 27.

Former Acquittal — Insufficient Indictment.

maxim of the common law is, that the life of a man shall not be twice¹ put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoils* acquitted or convicted of the same offence is a good plea, yet it is intendable of a² lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason he was not *legitimo modo acquietatus*, and that is well proved, because upon such acquittal he shall not have an action of³ conspiracy, as it is agreed in 9 E. 4. 12, a. b. *vide* 20 E. 4. 6. And in such case in appeal, notwithstanding such insufficient indictment, the abettors shall be enquired of, as it is there also held; and although the judgment is given that he shall be acquitted of the felony, yet this acquittal shall not help him, because he was not *legitimo modo acquietatus*; and when the law saith, that *auterfoils acquitted* is a good plea, it shall be intended when he is lawfully acquitted; and that agrees with the old Book in 19 E. 3, Corone, 444,⁴ where it is agreed, if the process upon indictment or appeal is not sufficient, yet if the party appears (by which all imperfections of the process are sav'd,) and is acquitted, he shall be discharged; but if the appeal or indictment is⁵ insufficient (as our case is,) there it is otherwise: but if one, upon an insufficient indictment of felony has judgment, *quod suspend' per coll'*, and so attainted, which is the judgment and end which the law has appointed for the felony, there he cannot be again indicted and arraigned till this judgment is reversed by⁶ error: but when the offender is discharged upon an insufficient indictment, there the law has not had its end, nor is the life of the party, in the judgment of the law, ever in jeopardy; and the wisdom of the law abhors that great offences should go unpunished, which was grounded without question upon these ancient maxims of law and state: Maleficianon debent remanere impunita, et impunitas continuum affectum tribuit delinquendi, et minatur innocentes qui parcit nocentibus: so if a man is convicted either by verdict or by confession upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end: and afterwards, upon a new indictment, the said Vaux was tried, and found guilty, and had his judgment, and was hanged.⁷

¹ 1 Bulstr. 142.² 3 Inst. 214; Cr. Car. 147; 20 H. 7, 12, a.³ 3 Inst; 143; Palm. 45; Bridgm. 132; Br. Consp. 23.⁴ 1 Bulstr. 142; Stamf. Cor. 106, a; B. N. P. 115, g; Palm. 39.⁵ Hal. Pl. Co. 244; Stamf. Cor. 106, a; Doct. pl. 36, 67; 3 Inst. 214; Hales pl. Cor. 247; 2 Leon. 160.⁶ Hale's pl. Cor. 247.⁷ See the note to the next case.

THE KING v. VANDERCOMB AND ABBOTT.¹

January Term, 1796.

Former Acquittal — Different Offences.

On a charge of burglary accompanied with a larceny, if the burglary be disproved, the prosecutor, to sustain the charge of larceny, cannot prove a larceny at a prior time, and on a different occasion from the alleged burglary.

A prisoner is not entitled to a copy of his indictment, to enable him to plead *autrefois acquit*.

The plea of *autrefois acquit* must state the record of acquittal.

A former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted thereof under the first indictment, upon proof of the facts averred in the second.

A plea of *autrefois acquit* on an indictment for a burglary and actual stealing certain goods, is not a bar to a subsequent indictment for burglary with *intent to steal* the same goods; for the two are not the same offence.

At the Old Bailey in January Session, 1796, James Vandercomb and James Abbott were tried before MR. JUSTICE HEATH, present SIR A. MACDONALD, Chief Baron, and MR. BARON THOMPSON.

The indictment charged the prisoners with having burglariously broken and entered the dwelling-house of Merial Neville, spinster, and Ann Neville, spinster, about the hour of six in the night of the 19th of November, 1795, and with having stolen a great variety of articles, some of which were laid to be the property of Merial Neville; others the property of Ann Neville; and others the property of Susannah Gibbs; and there was a second count in all respects like the first, excepting that it alleged the house to be the dwelling-house of Merial Neville only.

The house was situated in Portugal-street, leading to Grosvenor-square, and was inhabited by the two Miss Nevilles, who were maiden sisters, and ladies of considerable fortune. On Friday, 17th July, 1795, the two ladies went to pass the remainder of the summer at the seaside, leaving Susannah Gibbs, their housekeeper, and another female servant, in the house, with directions to secure the doors and windows, and to follow them on the succeeding Monday; which they did accordingly, after making every window fast, locking every inside and outside door, and leaving, according to Miss Neville's directions, the keys tied together at Mr. Slack's, in Mount-street, who locked them up in his own private drawer, where they remained untouched

¹ 2 Leach, C. C. 708; East, P. C. 519.

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until the 19th November following. On the night of the preceding day the wind had risen to such a height, and blown so violently, that the roofs and chimneys of many houses in London and its neighborhood received considerable damage; and Mr. Slack, on the ensuing morning, thought it advisable to see whether Miss Neville's house had received any injury during the storm; but on his entering the house, although the walls and roof, and every other outside part were perfectly secure, he found every inside door broken open, the carpets cut up from the floor, the wine-cellar ransacked, part of the furniture broken, almost every article removed from its place, and some of it packed up, and lying in the passage, ready to be taken away; but no person was found in the house, nor was the breaking by which the entry had been made anywhere discoverable. Alarmed at finding the property which had been placed under his care, in this situation, he proceeded, after showing the scene to a number of his friends, and locking the street door with a double lock, to give information of these circumstances to the magistrates at the public-office in Bow-street, who advised him to return immediately to the spot, to conceal himself in some neighboring place from whence he might observe the house, and to seize such persons as might go there to fetch away the things. He accordingly went to the adjoining house, where he waited until four o'clock in the afternoon; but not perceiving any person whom he could suspect, he went home, wrote a letter to the Miss Nevilles, to inform them of what had happened, and returned, with his son and his friends, to the reconnoitring station, just as the clock struck six; from whence they almost immediately observed, through the joinings of the shutters, the glimmer of a light in the parlor of the house; and on looking through the keyhole, they perceived a man, with a lighted candle in his hand, go from the parlor-door towards the staircase. Upon this they collected further assistance, to the amount of ten or twelve persons, from the neighboring public-houses; and entered the house by the street door, which Mr. Slack was now surprised to find only single-locked. On going up stairs they met the prisoners coming down. The prisoners at first retreated to the first floor; but turning round, endeavored to cut their way through their pursuers; and it was not till after they had made a very desperate resistance, that they were secured. On the return of the Miss Nevilles and their servants to town, it appeared, upon an examination of the property remaining in the house, that the several articles mentioned in the indictment, together with many other things, had been taken away; but at what time they had been taken could not be discovered. It also appeared that no perceptible alteration had been made in the situation of any of the articles in the house, between the time of Mr. Slack's quitting it, about three o'clock, and

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the time when the prisoners were apprehended; and as they might have entered the house soon after five o'clock, when there was still sufficient daylight remaining by which the features of a man's face might have been discovered, the counsel for the crown, upon an intimation from the court that this could not be a nocturnal breaking, abandoned the prosecution for the burglary.

But they submitted to the court that they might proceed to give evidence of the larceny; and contended that if they could affect the prisoners, or either of them, with having removed any one of the articles mentioned in the indictment, it would be sufficient to enable the court to leave the case to the jury.

This was objected to by the counsel for the prisoners; for that the prisoners were called upon by the present indictment to answer the charge of a burglary accompanied with a larceny; which case might be attended with circumstances that would entitle them to the benefit of clergy; but that the larceny now proposed to be proved against them was a perfectly distinct felony, of which, as they could not possibly be apprised when they were arraigned upon the present indictment, they ought not now to be called upon to answer.

THE COURT. It seems to be a perfectly distinct felony. It appears most clearly that nothing was taken away after these men entered the house; and that there was not such a removal of any one article as will constitute an *asportavit* in contemplation of law. The indictment charges the prisoners with burglariously breaking and entering the house and stealing the goods; and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the house; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony committed before three o'clock, on this day, at which time it is clear they had not entered the house. Having tried, without effect, to convict them of the breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods on the day laid in the indictment; but to introduce the proposed charge, it is said that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present. The form of the indictment decides the question. If they had been proved, after breaking the house, to have removed any of the articles that were in the house; or if they had been proved to have removed those things that were tied up in from their several places above stairs, into the passage below, it would have been a sufficient removal to answer the larceny, if

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those articles had been included in the indictment; for one of the charges against them would then have been made out, and the only question remaining would have been on the burglary.

The jury, thereupon, by the direction of the court, acquitted the prisoners; but, as the grand jury were not discharged, the prisoners were detained in custody, in order to have another indictment preferred against them.

And accordingly two indictments were preferred against them, one charging them with having burglariously broken and entered the house of Merial Neville and Anne Neville, with intent to steal the goods; and the other, with having stolen the goods in the dwelling-house, stating other goods than those stated in the former indictment, and laying them respectively to be the property 1st, of Merial Neville; 2dly, of Ann Neville; and 3dly, of Susannah Gibbs; and they were arraigned upon both indictments; to both of which they pleaded pleas of *autrefois acquit* upon a former indictment.

The prisoners, in order that their pleas of *autrefois acquit* might be drawn with greater accuracy, prayed that they might be furnished with copies of the several indictments; but the court refused to grant them copies, but said they were entitled to hear the indictments read very slowly and distinctly over; and they were accordingly so read by the clerk of the arraigns.

It appeared that the indictment for stealing in the dwelling-house, contained other articles, or the same articles differently described, and laid, as to part of them, to be the property of different persons than what were included in the indictment for the burglary and larceny, on which the prisoners had been acquitted; and therefore the counsel for the prisoner withdrew the pleas of *autrefois acquit*, as they did not aver that the goods so added and differently described were the same goods, the taking of which constituted the same offence; and the court gave them time to consider whether they could by any averment bring in issue the question, whether the charges in the two indictments did, or did not, in fact, constitute the same offence.

On the ensuing morning the prisoners were arraigned on the following indictment:

“ MIDDLESEX.—The jurors for our lord the king upon their oath present, that James Vandercomb, late of the parish of Saint George, Hanover-square, in the county of Middlesex, laborer; and James Abbott, late of the same, laborer; on the nineteenth day of November, in the thirty-sixth year of the reign of our sovereign lord George the Third, of Great Britain, &c. about the hour of six in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of Merial Neville, spinster, and Ann Neville, spinster, there situate, feloniously and burglariously

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ously did break and enter, with intent the goods and chattels of the said Merial and Ann in the said dwelling-house, then and there being found, then and there feloniously and burglariously to steal, take and carry away, against the peace of our said lord the king, his crown and dignity."

To this indictment "the said James Vandercomb and James Abbott, protesting that they were not guilty¹ of the premises charged in the said indictment, demand judgment of the said indictment, and all and every part thereof, they having heretofore, by a jury of the country, in due form of law, been acquitted and discharged of the premises in the said indictment above specified, and charged on them, and for plea to the said indictment, say, that our said lord the king ought not further to prosecute them by reason of the premises in the said indictment mentioned; because, they say, that heretofore, to wit, at this now present delivery of the king's gaol of Newgate, now holding for the county of Middlesex, at Justice Hall in the Old Bailey, in the suburbs of the city of London, they the said James Vandercomb and James Abbott stood indicted by the names and description of James Vandercomb, late of the parish of Saint George, Hanover-square, in the said county of Middlesex, laborer, and James Abbott, late of the same, laborer; for that they the said James Vandercomb and James Abbott, on the 19th day of November, in the thirty-sixth year of the reign of our sovereign lord George the Third, king of Great Britain, &c. about the hour of six in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of Merial Neville, spinster, and Ann Neville, spinster, there situate, then and there feloniously and burglariously did break and enter, and one pair of scales, of the value of two shillings, &c. of the goods and chattels of the said Merial Neville, spinster; two satin gowns of the value of sixty-three shillings, the goods and chattels of the said Ann Neville, spinster; one feather bed of the value of four pounds, &c. of the goods and chattels of Susannah Gibbs, widow, in the said dwelling-house, then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace of our said lord the king, his crown and dignity; and also for that the said James Vandercomb and James Abbott, afterwards, to wit, on the said nineteenth day of November, in the thirty-sixth year aforesaid, about the hour of six in the night of the same day, with force and arms, at the parish last aforesaid, in the county aforesaid, in the dwelling-house

¹ The plea, as it was originally delivered to the court, did not plead over; but the court conceiving this to be absolutely necessary, the prisoners pleaded over to the burglary, "Not Guilty," and it was added to the plea in parchment.

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of Merial Neville, spinster, there situate, feloniously and burglariously did break and enter, and one pair of scales, &c. of the goods and chattels of Merial Neville, spinster; two satin gowns, &c. the goods and chattels of Ann Neville, spinster; and one feather bed, &c. of the goods and chattels of the said Susannah Gibbs, widow, in the said last-mentioned dwelling-house, then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace of our said lord the king, his crown and dignity; as by the said indictment now here remaining, affiled of record in the said court of the delivery of the said gaol of our said lord the king of Newgate, more fully and at large appears. On which said indictment they the said James Vandercomb and James Abbott, afterwards, to wit, at the same session of gaol delivery now holding for the county of Middlesex as aforesaid, in due form of law were tried, and by a jury of the county, then and there in due form of law chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment last above mentioned, specified, then and there, in due form of law were acquitted and found not guilty of the premises in the said last-mentioned indictment specified and charged on them as they the said James Vandercomb and James Abbott in their plea to the said last-mentioned indictment in that behalf have alleged, whereupon it was considered and adjudged by the said last-mentioned court there, that they, the said James Vandercomb and James Abbott of the premises in the said last-mentioned indictment specified, should be discharged and go acquitted thereof; and the said James Vandercomb and James Abbott further say, that they, the said James Vandercomb and James Abbott, now here pleading, and the said James Vandercomb and James Abbott, in the indictment aforesaid, named, and thereof acquitted as aforesaid, are the same identical persons, and not other or different persons; and that the said burglary in the said dwelling-house of the said Merial Neville and Ann Neville, in the indictment aforesaid above pleaded, specified, and supposed to be done and committed by them the said James Vandercomb and James Abbott is the same identical and individual burglary, as in the said indictment, to which they, the said James Vandercomb and James Abbott are now here pleading, is supposed and alleged to have been done and committed by them the said James Vandercomb and James Abbott, and not other or different, to wit, at the parish of Saint George, Hanover Square aforesaid, and in the county aforesaid; and this they are ready to verify, &c. Wherefore they pray judgment of the court here, whether our said lord the king will or ought further to prosecute, impeach, or charge them on account of the premises in the said indictment, to which they, the said James Vandercomb and James Abbott are now here

pleading, contained and specified, and whether they ought further to answer thereunto; and that they may be dismissed this court without delay.”¹

To this plea there was the following demurrer:—“And Thomas Shelton, Esquire, who prosecuteth for our said lord the king, in this behalf, cometh and saith that, for and notwithstanding any thing in the said plea of the said James Abbott and James Vandercomb by them above pleaded, our said lord the king ought further to prosecute them the said James Abbott and James Vandercomb, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; because he saith that the said plea and the matters therein contained are not sufficient in law to bar our said lord the king from further prosecuting them, the said James Abbott and James Vandercomb, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; and this the said Thomas Shelton is ready to verify. Wherefore he prays judgment that our said lord the king may further prosecute them the said James Abbott and James Vandercomb, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; and that the said James Abbott and James Vandercomb may answer over to the same indictment.”

To this demurrer there was a joinder as follows: “And the said James Vandercomb and James Abbott being now here as aforesaid, in their proper persons, under the custody of the said sheriff of the county of Middlesex; say that the said plea of them the said James Vandercomb and James Abbott, in form aforesaid, above pleaded; and the matters therein contained are sufficient in law to bar our said lord the king from further prosecuting them, the said James Vandercomb and James Abbott, by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and this they are ready to verify, &c. Wherefore, as before, they pray judgment, and that our said lord the king may be barred from further prosecuting by reason of the premises mentioned in the said indictment, to which the said plea of them, the said James Vandercomb and James Abbott is above pleaded, and that they may be dismissed this court without delay, &c.”

The question contained in the pleadings was argued in the

¹ To this plea of *autrefois acquit* the counsel for the crown at first proposed to reply *ore tenus*, “*nul tiel record*,” but the prisoner’s counsel insisted that it must be in parchment; for that only the attorney-general could make such a replication *ore tenus*; and the court said that it must be in parchment, for otherways the parties would not have equal justice, as by its being pleaded *ore tenus* the prisoners would be deprived of the opportunity of taking advantage of any defect there might happen to be in the form of the replication.

Exchequer Chamber, before all the judges, by the two senior counsel.

MR. JUSTICE BULLER, in June session, 1796, after stating the pleadings, delivered the opinion of the judges upon this case. This is a demurrer to a special plea of *autrefois acquit* in bar of an indictment for a burglary with intent to commit a felony. The question raised by this demurrer has been argued before all the judges of England. On that argument it was contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary is charged to have been committed are precisely the same both in the indictment for the burglary and stealing the goods, on which the prisoners were acquitted; and in the indictment for the burglary with intent to steal the goods, which is now depending, the offence charged in both is in contemplation of law the same offence, and that of course the acquittal on the former indictment is a bar to all further proceeding on the latter. To support this proposition two cases in Kelynge's Reports were relied on. It is quite clear, that at the time the felony was committed there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case; for burglary is of two sorts; First, breaking and entering a dwelling-house in the night time, and stealing goods therein; Secondly, breaking and entering a dwelling-house in the night time, with intent to commit a felony, although the meditated felony be not in fact committed. The circumstance of breaking and entering the house is common and essential to both the species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary, to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed or intended to be committed. See *Joseph Dobbs's case*, 2 East, C. L. 513; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. See 2 East, 520, *notis*. In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment, charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other. Neither do the authorities quoted on behalf of the prisoners support the proposition contended for; nor are there any legal authorities by which this plea can be maintained. The two cases

quoted on behalf of the prisoners were *Turner's case*, Kely. 30, and *Jones and Beaver's case*, Kely. 52. *Turner's case*, as stated by Lord Chief Justice Kelynge, was thus: James Turner and William Turner were indicted for a burglary in breaking and entering the dwelling-house of Mr. Tryon, in the night, and stealing therein great sums of money; on which James Turner was found guilty and executed, but William Turner was acquitted. But afterwards there being strong evidence that William Turner was concerned in the same burglary with James Turner, and there being £47 of the money of one Hill, a servant of Mr. Tryon, stolen at the same time, which £47 was not laid in the former indictment, the prosecutor intended to indict William Turner again for burglary, for breaking the house of Mr. Tryon, and taking therein the £47 of the money of Hill; "but," says the book, "we all agreed, that William Turner being formerly indicted for burglary in breaking the house of Mr. Tryon, and stealing his goods, and acquitted, he cannot now be indicted again for the same burglary of breaking the house: but we all agreed that he might be indicted for felony in stealing the money of Hill, for they are several felonies, and he was not indicted for this felony before; and so he was indicted; and afterwards I told my Lord Chief Justice Bridgman what we had done, and he agreed the law to be so as we had directed." The decision in this case was not a solemn judgment, for the prisoner was not indicted a second time for the burglary; it was merely a direction from the judges to the officer of the court how to draw the second indictment for the larceny, and it proceeded upon a mistake as I shall presently show. If the judges in that case exercised a little lenity before the indictment which might more properly have been done after conviction, much censure could not fall on them. But they proceeded on the ground that William Turner having been indicted for burglary in breaking the house of Mr. Tryon, and stealing his goods, and acquitted thereof, could not be again indicted for the same burglary for breaking the house, though he might be indicted for stealing the money of Hill, for which he had not been indicted before; and he was indicted accordingly. The judges, therefore, must have conceived that the breaking the house and the stealing the goods were two distinct offences, and that breaking the house only constituted the crime of burglary; which is a manifest mistake; for the burglary consisted in breaking the house and stealing the goods; and if stealing the goods of Hill was a distinct felony from that of stealing the goods of Tryon, which it was admitted to be, the burglaries could not be the same. The fact was that William Turner broke into the house of Tryon, and at the same time stole the money of both Tryon and Hill; he had been tried for breaking Tryon's house, and stealing his money, on

which trial the prisoner's life had been in jeopardy for this offence; for he might have been convicted if the prosecutor had used due diligence in bringing forward his evidence; yet the judges were of opinion that he might be tried for the other part of the same act, viz. stealing the money of Hill; and if no money belonging to Tryon had been stolen, probably the question, in that case, never would have arisen, for then the first indictment would have been wholly inapplicable to the facts of the case, and the prisoner in no danger at all upon it; but that circumstance could not vary the law of the case, and the opinion certainly proceeded from the want of adverting to what was necessary to constitute the crime of burglary. The case of *Jones and Beaver* proceeded entirely upon the decision in *Turner's case*, and if the foundation fail, the superstructure cannot stand. There the prisoners were indicted for burglariously breaking and entering the dwelling-house of Lord Cornbury, and stealing his goods therein, and being acquitted, were afterwards indicted for the same burglary in breaking and entering Lord Cornbury's house and stealing the goods of a Mr. Nunessey; and it was agreed that, as they had been before acquitted, they could not be indicted again for the same burglary, but that they might be indicted for the felony in stealing the goods of Nunessey, precisely as had before been done in *Turner's case*. But authorities are not wanting to show the principle and foundation upon which the plea of *autrefois acquit* is built and must be sustained. Hawkins, in his *Treatise on the Pleas of the Crown*, Bk. 2, c. 35, s. 3, says, "If the party were never known by the name in the first indictment, it is questionable whether the prisoner could be found guilty upon it, and if he could not, it seems plain that his life never having been in danger by it, the acquittal upon it cannot be any bar to a subsequent indictment."—Sir Michael Foster, Foster, C. L. 361, says, "It is clear, that if A. be indicted as principal, and B. as accessory, and both are acquitted; yet B. may be indicted as principal in the same offence, and his former acquittal is no bar." Again, in page 362, "If a person, indicted as principal cannot be convicted upon evidence tending barely to prove him to have been an accessory before the fact, which I think must be admitted, I do not see how an acquittal upon one indictment could be a bar to a second for an offence specifically different from it." In the case also of *The King v. Pedley*, 1 Leach, 242, case 122, in the King's Bench, in Trinity Term, 1782, which was an indictment for arson, there were distinct counts for burning the house, first, of Francis Perry; secondly, of Thomas Combe; thirdly, of the Mayor and Corporation of Bristol; and the special verdict found that the Mayor and Corporation of Bristol were seised of three houses; that they demised the same to Thomas Combe, who demised the same to

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Francis Perry, who demised them to a person of the name of Landry; it was in fact one and the same house differently described in the indictment as belonging to the different persons I have mentioned, except Landry; but there was no count for burning the house of Landry; and, after argument on this case, the Court of King's Bench were of opinion that as the house was in the possession of Landry, none of the counts were proved, and therefore gave judgment for the prisoner; but as he had not been tried for burning the house of Landry, he was sent back to Bristol, and again tried, though he was acquitted. These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon it, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. A former acquittal is no bar to a subsequent prosecution unless the accused *could have been* convicted upon the first indictment, upon proof of the facts averred in the second. Now, to apply the principle of these cases to the present case: The first indictment was for burglariously breaking and entering the house of Miss Nevilles and stealing the goods mentioned; but it appeared that the prisoner broke and entered the house with intent to steal, for in fact no larceny was committed, and therefore they could not be convicted on that indictment; but they have not been tried for burglariously breaking and entering Miss Neville's house with intent to steal, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment.

The prisoners were accordingly tried on the indictment, and upon evidence that the entry into the house must have been after it was dark, they were convicted.

It was a familiar principle of the ancient common law of England, that if a person was once attainted for any felony, he could plead that attainder in bar to a subsequent prosecution for any *other* felony whether committed before or after the first conviction; for, by his first attainder his possessions were forfeited, his blood corrupted, and he became dead in law: therefore, any further conviction or attainder was deemed superfluous. 4 Black. Comm. 336; 2 Hale, P. C. 250. And as late as 1814, we find a similar principle recognized and acted upon in England, in *Rex v. Birkett*, Russell & Ryan, 268,

where it was held that a man, upon whom sentence of death had been passed for a felony, ought not, while under that sentence, to be punished for another felony, although on the trial of the last charge he neglected to plead his former conviction and attainder, which he well might have done. Still later, in 1819, in *Rex v. Jennings*, Russell & Ryan, 388, a person was tried and convicted of the manslaughter of Mary Cormack, and received the benefit of clergy. Being subsequently indicted and convicted of the manslaughter of Mary Anne Condon, by the same act which caused the death of

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Mary Cormack, eleven of the judges of England held that the former allowance of clergy protected the prisoner against any punishment upon the second verdict. Strange to say, this principle in its worst form has once received the deliberate sanction of an American court, and it has been here held that a conviction and punishment of one felony is a bar to any prosecution for former felony not capital, of whatever kind or nature. *Crenshaw v. The State*, Martin & Yerger, 122, (1828.) On the other hand, any such doctrine, although not often expressly repudiated (but see *Hawkins v. The State*, 1 Porter, 475; *The State v. McCarty*, 1 Bay, 334,) is as clearly repugnant to the established principles of modern criminal law, as it is unsupported by reason. Waiving therefore any farther examination of this doctrine, let us consider the principle of a former conviction or acquittal as now understood. It may be stated thus: A regular conviction or acquittal upon a sufficient indictment is a good plea in bar to a subsequent prosecution for the same offence. This subject naturally presents the following points for our consideration.

First. The first conviction or acquittal must have been regular.

Second. It must have been upon a sufficient indictment or complaint.

Third. It must have been for the same identical offence.

Fourth. The objection must be taken by a plea in bar.

1st. *The first conviction or acquittal must have been regular.*

And to this end it is essential, as the first requisite, that the court in which the former case was determined, should have had jurisdiction of that offence; for *non constat* but that the former verdict, if an acquittal, was upon the ground of want of jurisdiction in the court, and not upon the merits. But whether it were so or not, a former conviction or acquittal in a court having no jurisdiction is an entire nullity, and no bar to a second prosecution. *Commonwealth v. Peters*, 12 Metcalf, 387, (1847); *The State v. Odell*, 4 Blackford, 156, (1836); *The State v. Payne*, 4 Missouri, 376, (1836); *Duan v. The State*,

2 Pike, 229, (1839); *Rector v. The State*, 1 English, 187, (1845); *Rex v. Bowman*, 6 Carrington & Payne, 337, (1834.) And not only must the court in the first case have had jurisdiction, but it must have had final jurisdiction. A discharge by a magistrate upon a complaint in which he has authority only to bind over and not to pass final sentence, is no bar to a subsequent prosecution and examination for the same offence. *Marston v. Jenness*, 11 New Hampshire, 156, (1840.) The mere fact, however, that the magistrate first ordered a prisoner to recognize to appear to a higher court, but afterwards at the same hearing revoked the order and sentenced him finally, will not prevent such sentence from being a bar to a subsequent prosecution, the magistrate having jurisdiction to award final judgment in the case. *Commonwealth v. Goddard*, 13 Mass. 455, (1816.) But an acquittal by any court having final jurisdiction, although in a foreign country, is a bar everywhere to any subsequent prosecution for the same offence. *Hutchinson's case*, cited in 1 Shower, 6; Buller's N. P. 245; *Rex v. Roche*, 1 Leach, C. C. 135, (1775.)

The former acquittal or conviction of the defendant must also have been regular in this; it must not have been procured by the fraud of the defendant, or others acting on his behalf; as where he fraudulently procures himself to be complained of before a magistrate, and a light penalty imposed, in order to prevent any subsequent *bonâ fide* prosecution. *Commonwealth v. Alderman*, 4 Mass. 477, (1808); *The State v. Little*, 1 New Hampshire, 257, (1818); *Commonwealth v. Jackson*, 2 Virginia Cases, 501, (1826); *The State v. Colvin*, 11 Humphreys, 599, (1851); *The State v. Lowry*, 1 Swan, 34, (1852.) The case of *Alderman*, 4 Massachusetts, 477, would seem to imply that in no instance can a conviction of an offence upon the information of the offender be a bar to a subsequent prosecution, even without any evidence of fraud or collusion in the defendant, since none appears in that case; but perhaps that is carrying the rule too far; for it has elsewhere been held that if different courts have con-

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current jurisdiction of the same offence, and an indictment be pending in one of them, the defendant may nevertheless procure himself to be indicted in the other court and voluntarily submit to a conviction there and pay the penalty; and that this conviction is a bar to further prosecution of the indictment which was first found. Such at least is the settled law of North Carolina. *The State v. Casey*, Busbee, 209, (1853); *The State v. Tisdale*, 2 Devereux & Battle, 159, (1836.) Fraud, therefore, on the part of the defendant in procuring the former conviction seems to be necessary to prevent its operation as a bar, and probably it existed in *Alderman's case*, although the report does not so state.

2d. *The former conviction or acquittal must have been upon a sufficient indictment or complaint.*

If the former trial resulted in a verdict of guilty, but upon an indictment so defective, that no valid judgment could be pronounced upon it, and none has been pronounced, it is no bar to a subsequent prosecution. *Pennsylvania v. Huffman*, 1 Addison, 140, (1793); *The People v. Casborus*, 13 Johnson, 351, (1816); *Commonwealth v. Hatton*, 3 Grattan, 623, (1846); *The State v. Phil*, 1 Stewart, 31, (1827); *The State v. Holley*, 1 Brevard, 35. And this is said to be so, although judgment was arrested on the first indictment for an insufficient cause; for it having been done on the defendant's own motion, he cannot be allowed to impeach it. *Gerard v. The People*, 3 Scammon, 362, (1842.) The same result follows if judgment has been rendered on the conviction, but the same has been afterwards reversed for error, on application of the prisoner; as when the punishment awarded was more severe than the law prescribed for the alleged offence. In such cases the judgment reversed is the same as no judgment, and as without a judgment no punishment can be undergone by the prisoner, the former proceedings are no bar to a subsequent indictment for the same offence. *Regina v. Drury*, 3 Cox, C. C. 544, (1849.) But if on the other hand, judgment has been given and the sentence performed

upon a complaint or indictment so defective that judgment *might have been* arrested, or reversed, this is a waiver by the defendant of all errors therein, and a second prosecution for the same offence cannot be sustained. The former conviction in such case is not entirely void, but merely voidable. If the defendant does not seek to reverse it, but acquiesces and performs the penalty, it is clear he is not again liable. *Commonwealth v. Loud*, 3 Metcalf, 328, (1841.) And see *Commonwealth v. Keith*, 8 Metcalf, 531, (1844.) In this respect it differs from a judgment pronounced by a court having no jurisdiction; such a judgment being not merely voidable, but absolutely void. For this reason, it may be, that in cases of a prior conviction, it is sometimes held that there must have been judgment actually rendered before it furnished a good plea in bar, since judgment may yet be arrested in that prosecution, or if rendered may be reversed, or a *nolle prosequi* may be entered, and so the defendant not suffer any penalty upon the former conviction. The English rule seems to be that there must be a formal judgment in every case, whether the former verdict was of conviction or acquittal, in order to bar a second prosecution. See *Regina v. Drury*, *supra*; 2 Hale, P. C. 251; *Regina v. Reid*, 1 Eng. Law and Eq. R. 591. But on the other hand, if the former verdict be an acquittal, it is said in America that no formal judgment is necessary thereupon, at least in this country; since judgment must follow of course, there being no new trial, appeal, or exceptions on behalf of the prosecution in a criminal case. *West v. The State*, 2 Zabriskie, 212, (1849); *The State v. Norvell*, 2 Yerger, 24, (1820); *The State v. Mount*, 14 Ohio, 295, (1846); *The State v. Benham*, 7 Connecticut, 414, (1829.) And some of these cases expressly hold that the former verdict, upon a good indictment, whether of conviction or acquittal, is itself, and without any judgment, a bar to a second prosecution. In like manner, if a defendant be acquitted upon a defective indictment, he is still liable to a second prosecution for the same crime. Such, at least, is the uniform

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course of decision. *Vaux's case*, 4 Coke, R. 44, *ante*; *Regina v. Richmond*, 1 Carrington & Kirwan, 240, (1843); *The People v. Barrett & Ward*, 1 Johnson, 66, (1806); *The State v. McGraw*, 1 Walker, 208, (1825); *The State v. Ray*, 1 Rice, 1, (1838,) where the subject is well examined by Butler, J. *Commonwealth v. Somerville*, 1 Virginia Cases, 164.

Exact justice would seem to require that if at the former trial the prisoner was in fact acquitted upon the merits, and not upon any technical defect in the indictment, he ought not to be again subject to prosecution for the same offence; and this is secured in some States by positive statute.

3d. *The prior conviction or acquittal must have been for the same identical offence.*

It is not sufficient merely that the former prosecution was for the same act, the same transaction; but it must have been for the same offence; "the same identical act and crime," the same in law as well as in fact. An acquittal on a charge of larceny would be no bar to a prosecution for obtaining the same goods by false pretences, although the acts complained of in each were the same. See *Regina v. Henderson*, 1 Carrington & Marshman, 328; 2 Moody, C. C. 192, (1841.) Neither would an acquittal on an indictment for having been present, aiding and abetting in a murder, be a bar to a prosecution for having been an accessory before the fact to the same murder. *Rex v. Birchenough*, 1 Moody, C. C. 477, (1836.) So an acquittal on a charge of attempting to poison A by mixing arsenic with flour, on a certain specified occasion, is no bar to a second prosecution for attempting to poison B by the same means, although there was but one act of preparation on the part of the defendant, and although he might have been indicted in the same bill, for attempting to poison both. In such case there are two distinct offences. *The People v. Warren*, 1 Parker, 338, (1852.)

So, a conviction for advising one slave to abscond, contrary to a statute law, is no bar to a second prosecution for advising a

different slave to abscond, although the advice was given to both, at the same time and by the same words. *Smith v. The Commonwealth*, 7 Grattan, 593, (1850.) In like manner, a person has been thought guilty of two distinct offences by trading at the same time with two different negroes, contrary to the statute; and therefore liable to two distinct prosecutions and penalties, although both slaves belonged to the same master. *The State v. Fife*, 1 Bailey, 1, (1828.) So if a statute forbids trading with a negro, and another statute prohibits retailing spirituous liquors without a license, it has been held that by retailing liquors to a negro, the seller incurs two penalties, one for retailing, and one for trading with a negro. *The State v. Sonnerkalb*, 2 Nott & McCord, 280, (1820.) And a later decision in the same State declared that by feloniously receiving stolen goods from a negro, two offences were committed, viz: felonious receiving and trading. *The State v. Taylor*, 2 Bailey, 49, (1830.) So if a person, at the same time, receives two parcels of stolen goods from the same thief, one being the property of A and the other the property of B, a conviction of the felonious receipt of one is no bar to a second prosecution for feloniously receiving the other. *Commonwealth v. Andrews*, 2 Massachusetts, 409, (1807.) And this divisibility of the same act into two offences has been pushed even further; and it has been thought that if a person steal two articles at the same time, from the same person, both being his sole and absolute property, that two offences are committed, for each of which a separate indictment and conviction can be had. *Regina v. Brettel*, 1 Carrington & Marshman, 609, (1842.) But this is certainly questionable. Lord Hale, however, is an authority to the same effect. 1 Hale, P. C. 241. The principle that the same act may however amount to two distinct offences is also well illustrated by the case of an assault and battery committed in presence of a court; in which case the offender may be punished for the contempt of court, and also prosecuted and fined for the assault and

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battery. *The State v. Yancey*, 1 Carolina Law Repository, 519. And see *Rez v. Osulton*, 2 Strange, 1107. In like manner, if one commit an assault at the same time, and by the same blow upon two persons, a conviction or acquittal upon an indictment alleging the assault upon only one is certainly no bar to a subsequent prosecution for the assault upon the other. *The State v. Standifer*, 5 Porter, 523, (1837.) And see also *Vaughan v. The Commonwealth*, 2 Virginia Cases, 273, (1821.) The decision to the contrary in *The State v. Damon*, 2 Tyler, 387, (1803,) is clearly not law. Neither is a conviction of an assault and battery a bar to a subsequent prosecution against the same defendant and others for a riot, being the same transaction in which the assault and battery was committed; as there are two distinct offences. *Freeland v. The People*, 16 Illinois R. 380, (1855.) See also *The State v. Parish*, 8 Richardson, 322, (1855.) In this case the defendant had been jointly indicted and convicted with others of an affray, and publicly beating one M. During the affray, the mother of M. came up to rescue her son from his assailants. While doing so, the defendant struck her two blows upon the head. It was held that the conviction of the affray was no bar to a subsequent prosecution for the assault and battery upon the mother of M. See farther *Scott v. The United States*, 1 Morris, 142, (1842); *Duncan v. The Commonwealth*, 6 Dana, 295, (1838.) The case of *The Commonwealth v. Kinney*, 2 Virginia Cases, 139, (1818,) seems in conflict with those last cited. The true test seems to be that the act charged in each indictment must of itself be an integral offence, and not merely an integral part of another offence. In other words, if the facts alleged in one indictment must necessarily be produced in evidence in order to make out such a charge as that contained in the other indictment, there are not two distinct offences, which are capable of being prosecuted and punished separately. It may be that this test has not been observed in all cases.

The rule requiring exact identity in the

two offences, also provides that an acquittal for stealing the property of J. G. should be no bar to a subsequent prosecution for stealing the property of J. G. A., unless it be proved by the defendant that the two names meant the same person. *The State v. Risher*, 1 Richardson, 219, (1845.) See also *Price v. The State*, 19 Ohio, 423, (1850); *Commonwealth v. Mortimer*, 2 Virginia Cases, 325. And see *Commonwealth v. Wade*, 17 Pickering, 394, (1835.) In this case an acquittal for burning the barn of A and B was held no bar to another indictment for the same burning, alleging the barn as the property of A and C. And an acquittal on a charge of stealing the property of P. P. is no bar to a second indictment for stealing the same article, alleged to be the property of some person unknown. *The State v. Birmingham*, Busbee, 120, (1853); *The State v. Revals*, Busbee, 200, (1853.) So an acquittal for stealing a certain bank-note, payable at "The Merchants and Traders' Bank," is no bar to a subsequent prosecution for stealing such a note payable at "The Mechanics' and Traders' Bank," since the offence is not the same. *Hite v. The State*, 9 Yerger, 357, (1836.) See, also, *Rez v. Cogan*, 2 Leach, C. G. 503; *Commonwealth v. Mortimer*, 2 Virginia Cases, 325; *Id.* 89; *Duckham v. The People*, 4 Scammon, 172. If, however, the variance in names is such that the defendant can prove that the person named was known as well by one name as the other, then the former prosecution would be a bar, since the defendant might have been convicted in that. Thus, if a person be indicted for the murder of Charles William, and be acquitted, and be subsequently indicted for the murder of Charles William Sheen, and he avers his former acquittal and avers and proves that the deceased was known by one name as well as the other, and that therefore he could have been convicted upon the first indictment, this is a good bar to the second. *Rez v. Sheen*, 2 Carrington & Payne, 634, (1827.) *A fortiori* if the former indictment charged the stealing of the goods of William Carr, an acquittal thereon, even

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on the ground that the owner's true name was John Wilson, would be a bar to a second prosecution for the same larceny, alleging the property to be that of "John Wilson, alias William Carr," the prisoner averring and proving that they were one and the same person. *Regina v. Austin*, 2 Cox, C. C. 59, (1846.)

In *The King v. Taylor*, 3 Barnewall & Cresswell, 502; 5 Dowling & Ryland, 422, it was held that an acquittal on an indictment for keeping a common gaming-house "on the 18th day of January, in the 57th year of the reign of our late sovereign, George the Third, and on divers other days and times, between that day and the day of taking the inquisition," which was found in the fourth year of George the Fourth, was not a bar to an indictment charging that the defendant kept such house "on the 20th of April in the second year of the reign of George the Fourth, and on divers other days and times, &c.," and that the defendant could not be allowed to show by evidence that both prosecutions were for the same offence. But ordinarily as the precise time is not essential, in this country, in the description of the offence, it would be admissible to show by parol that a former conviction was for the same offence, although alleged to have been done upon a different day. But where an offence is of a continuing character as in *The King v. Taylor*, *supra*, or in any nuisance, a conviction for a previous period would of course be no bar to a subsequent prosecution for the same nuisance during a subsequent period. *The People v. Townsend*, 3 Hill, 479, (1842.) But whether a conviction of any continuing offence, as for being a common seller of spirituous liquors, for a given period, as from the first of July, 1857, to the first of January, 1858, would not be a bar to an indictment subsequently found, but alleging the offence as having happened at a previous period, as from the 1st of January, 1857, to the 1st of July, 1857, is not apparently so well settled. The right of a public prosecutor to divide a year, through all of which a continuing offence has been committed, into as many portions as he may choose, and prosecute

for each, is, at least, very questionable. Of course, it is no defence to a prosecution for a single sale of spirituous liquor made in a certain month, that the defendant has since that time been indicted and convicted of another sale alleged to have been made prior to the other, without proof that it was the same identical act. *The State v. Ainsworth*, 11 Vermont, 91, (1839.) In *Regina v. Champneys*, 2 Moody & Robinson, 26, it was thought that if an insolvent debtor be acquitted on an indictment charging him with fraudulently omitting certain articles from his list of property, he may again be indicted for omitting certain other articles from the same list.

A few additional cases may be referred to as illustrating the difficulties supposed to attend the divisibility of one act into two offences, and punishing it as such. Some of them, it may be difficult to reconcile with principle or with the weight of authority on this question. In *The State v. Townsend*, 2 Harrington, 543, (1839,) it was held that a conviction of a riot, in a meeting-house, during public worship, was a bar to a subsequent indictment "for disturbing a religious meeting," since it was made by statute the duty of the court to punish the rioters on the first conviction, according to the aggravated character of the offence, and as they must take the surrounding circumstances into consideration when awarding sentence for the riot, the defendant would be really punished for disturbing the meeting, upon the first indictment. And *The State v. Cooper*, 1 Green, 31, (1833,) declared that if a person was convicted of arson in burning B's house, wherein C at the time was, thus causing his death, he could not be subsequently indicted for the murder of C. by the same burning. See other instances in *The State v. Fayetteville*, 2 Murphey, 371, that a town bound to keep its streets in repair, could not be separately indicted for several defective streets on the same day; and *Fiddler v. The State*, 7 Humphreys, 508, (1847,) that when a statute prohibited betting on, or running a horse-race, that a person who had both run a race and bet upon it, could not be con-

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victed of two offences, because, as the court say, he could not bet, unless there had been a race, and therefore the racing was a necessary part of the betting, and having been already convicted of running the race, he had suffered for a part of the other crime, and could not be indicted for it separately; a mode of reasoning, which if sound, would overturn many of the convictions elsewhere had. In *The State v. Benham*, 7 Connecticut, 414, (1829,) it was held that having forged bank-notes of two separate banks in one's possession at the same time, with intent to pass them as genuine, and defraud such banks, constituted but one indivisible offence, and if first indicted and convicted for passing but one of such notes, the defendant could not again be indicted for the unlawful possession of the other. But it is difficult to reconcile this case with many others, especially *Commonwealth v. Andrews*, 2 Mass. 409; *Regina v. Brettel*, 1 Carrington & Marshman, 609; and *Rex v. Champneys*, 2 Moody & Robinson, 26.

The remaining authorities under this head of the subject seem to warrant the two following propositions:

A former conviction or acquittal of a minor offence is a bar to a prosecution for the same act charged as a higher crime, whenever the defendant, on trial of the latter, might be legally convicted of the former, had there been no other prosecution.

A former conviction or acquittal of a higher offence is a bar to a prosecution for the same act charged as a less offence, if on trial of the former, the defendant might have been upon any competent evidence legally convicted of the latter.

These propositions, when closely examined, flow directly from that great principle of the common law, that no man shall twice be put in jeopardy for the same offence. If, therefore, a person has been indicted and convicted of manslaughter, he cannot be again prosecuted for the same homicide charged as murder; for although these crimes are not exactly the same, yet as the person when on trial for murder might, by the rules of law, have been convicted of manslaughter, if the evidence failed to sustain the more serious offence, it would follow that if he had been already

convicted of manslaughter in a prior indictment for that crime alone, he might, on the trial for murder, be convicted of the same identical crime, and thus be punished twice for the same offence; a result quite repugnant to the common law of England. And for precisely a similar reason, a conviction of a simple assault is a bar to a second prosecution for the same transaction set forth as an assault and battery. *The State v. Chaffin*, 2 Swan, 493, (1852); or as aggravated assault; *Commonwealth v. Cunningham*, 18 Mass. 245, (1816.) And see *Commonwealth v. Squire*, 1 Metcalf, 258, (1840.) So if a defendant be convicted of a larceny, he cannot be again indicted and punished for the same taking charged as a robbery; for on the last indictment, the defendant is in jeopardy of being again convicted of larceny, if the violence should not be clearly proved. *The State v. Lewis*, 2 Hawks, 98, (1822.) In like manner it has been thought that a conviction for an assault with intent to commit a rape would bar a second prosecution for the same occurrence described as a complete rape. *The State v. Shepard*, 7 Connecticut, 54, (1828.) But the propriety of this last decision depends entirely upon the question whether the defendant on a trial for rape, can, at common law, be convicted of an assault with intent to commit that offence. The Supreme Court of Connecticut, distinctly recognizing the test already laid down in this note, held that he could; and, therefore, having once been tried for the assault with intent, and convicted thereof, he could not again be tried for any offence involving such assault, as he might be again convicted of the identical assault. A similar decision was once made in Massachusetts, in *Commonwealth v. Cooper*, 15 Massachusetts, but that decision was overruled and declared to be erroneous by the decision of *Commonwealth v. Roby*, 12 Pickering, 496.

The necessary conclusion from the foregoing principles is that a prosecution for a higher offence is not barred by a former conviction, if on trial of the higher, the prisoner cannot be convicted of the less, or if the facts in the mean time have made the act a different offence.

A very striking illustration of this prin-

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ciple occurred in *Commonwealth v. Roby*, 12 Pickering, 496, (1832,) a very important case on this branch of criminal law. The prisoner had been tried and convicted of an assault with intent to kill and murder Maria Leonard. After this indictment was found, Maria Leonard died of the injury so received, and an indictment for her murder was then found against the prisoner. He relied upon his former conviction in bar, but it was held, after a full review of the authorities and principles of the law of former convictions, that the two offences were distinct, although the act was the same in both. If a party assaulted dies within a year and day, the same act, which till the death was an assault and a misdemeanor only, though aggravated, is by the death shown to have been a mortal wound, a capital felony. See, also, *The State v. Jesse*, 3 Devereux & Battle, 98, (1838.) A very similar case recently arose in the State of New York, in *Burns & Cary v. The People*, 1 Parker, C. C. 183, (1848.) There the defendants had been convicted of an assault and battery upon Clark Cromb. After such conviction, Cromb died of the injuries so received. Being subsequently indicted for his manslaughter, the defendants relied upon the former conviction in bar. But the plea was overruled, on the ground before stated, that the facts in the two prosecutions were essentially different; for in the last case the indictment contained facts which did not exist at the time the defendants were tried for the assault and battery; Cromb was then living, but at the second prosecution he was dead. The original act of the defendants was the same, but the subsequent event related back and gave that act a new character. It then became a different crime. Another reason, also, may be given, viz., that on the trial for murder, the defendant is in no jeopardy of being convicted of an assault and battery, at the common law, and, therefore, in this case was in danger of being twice convicted of the same offence. The reasoning in all these cases leads to the conclusion that if one be convicted of an act which is of itself a complete offence, but which afterwards becomes part of another

and higher offence subsequently completed, he may be nevertheless prosecuted for the higher offence, and the former conviction is no bar. Thus, by the law of Massachusetts, three single sales of spirituous liquor, contrary to law, constitutes a common seller, an offence for which a fixed penalty is prescribed. A single sale of such liquor is also a complete offence, for which a less penalty is prescribed. Upon the authority of *Commonwealth v. Roby*, it seems difficult to see why a conviction for a single sale would be any bar to subsequent prosecution as a common seller, or making three sales, although one of the three was the identical sale for which the defendant has already been punished. Would not the two subsequent sales relate back to the first, and give it a new character; itself becoming part of a new, distinct, and higher crime? "The same act, says Lord Denman, C. J., in *Regina v. Bulton*, 11 Queen's Bench, 946, (1848,) may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery; an acquittal on the first charge is no bar to a second inquiry when both are charges of felony; neither ought it to be when one charge is a felony and the other a misdemeanor." And the whole reasoning of the court in that case goes to sustain the position that several defendants might be convicted of a conspiracy to defraud another of his property, and if the act had been successful, they might also be convicted of larceny, or acquiring property by false pretences, as the facts would warrant, and although the facts proved in the second prosecution were the same involved in the former inquiry upon the charge of conspiracy.

The second proposition under this head, before laid down was:

A former conviction or acquittal of a higher offence is a bar to a prosecution for the same act charged as a less offence, if on trial of the former the defendant might have been, upon any competent evidence, legally convicted of the latter.

With reference to a former conviction under this head, it is easy enough to see that a conviction of the higher offence

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ought clearly to be a bar to a second prosecution for an offence of less grade involved in the former. That after a conviction for murder, no prosecution can be sustained for the same act charged as manslaughter, it needs no argument or authority to prove; but when a former trial for a greater offence has resulted in an *entire acquittal*, and a second prosecution is instituted for the same transaction charged as an offence of a lower grade, it then becomes a more delicate and more difficult question to know whether the former entire acquittal extends to the offence described in the second indictment. And on this question, however the adjudged cases may differ in their application of the principle to a particular case, yet all agree in the principle itself, viz. that if by the rules of law the party could by any admissible evidence have been convicted of the second offence when on trial upon the former indictment, then whether such evidence was, or was not offered at the first trial, or if offered, was erroneously rejected, then the party has been once in jeopardy, and cannot again be tried.

The reader will find the subject of a conviction of a less offence, when on trial for a greater, discussed in a former note in this volume, to the case of *Rex v. Westbeer*, ante, 454. A familiar illustration is that of an acquittal on a charge of murder; this is a bar to a second prosecution for the same act charged as manslaughter; since by the rules of law, the defendant might have been convicted of the less offence when on trial for the higher. So an acquittal on a charge of robbery is a bar to a subsequent indictment for larceny of the same goods, since as the former includes the latter, the prisoner might lawfully have been convicted of larceny on the first trial. *The People v. McGowan*, 17 Wendell, 386, (1837.) In like manner, if one be indicted, upon a statute against seduction, as that crime includes fornication, he might be convicted of the latter offence merely, and as he is liable to such conviction, an entire acquittal upon the first indictment will be a bar to a second prosecution, for the fornication alone. *Dinkey v. The Commonwealth*, 5 Harris, 126, (1851.) And

for a similar reason, if four be jointly indicted for an offence which may be joint or several, and all are acquitted, no one can be again indicted separately for the same offence, since on the former trial any one might have been convicted, and the others acquitted. *Rex v. Dann*, 1 Moody, C. C. 424, (1835); *Rex v. Parry*, 7 Carington & Payne, 836, (1837.) But if the former joint indictment was erroneous, for joining persons for an offence which could not be committed jointly, as for perjury, an acquittal thereon will be no bar to a subsequent prosecution against each. See *Commonwealth v. McChord*, 2 Dana, 244, (1834.) But as on a charge of being a common seller of spirituous liquors during a certain specified time, the defendant could not be convicted of making a single sale to one person, without a special count for that purpose, he may be subsequently convicted of such single sale during the period for which he was convicted as a common seller. *The State v. Maher*, 35 Maine, 225, (1853); *The State v. Coombs*, 32 Maine, 529, (1851.)

4th. *The objection of a former acquittal or conviction must be taken by a plea in bar.*

Involving as it does, a question of fact, as well as of law, it must be so stated on the record that it may be traversed or demurred to. It is, therefore, no cause for a motion to quash, plea in abatement, or motion in arrest of judgment. *The State v. Barnes*, 2 Redington, 580, (1851.) Nor can it be put in evidence by way of estoppel. *The State v. Jesse*, 3 Devereux & Battle, 98. The plea must set forth the former indictment and the acquittal or conviction in the former court, and it seems to be essential that the record thereof should be set forth in full. *Rex v. Wildey*, 1 Maule & Selwyn, 188, (1813,) and see *Wortham v. The Commonwealth*, 5 Rand. 669, (1827.) The plea must also aver the identity of the defendant with the person formerly acquitted or convicted, and also the identity of the offence charged in the last, with that set forth in the first indictment. *Quoid v. The People*, 3 Gilman, 76, (1846.) And evidence is admissible upon both sides upon the question of identity. *The People v. McGowan*, 17 Wendell, 386;

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Duncan v. The Commonwealth, 6 Dana, 295. Of course the burden of proof is throughout upon the defendant; and this burden is not changed merely by *prima facie* evidence of the identity of the two offences. *Commonwealth v. Daley*, 4 Gray, 209, (1855.) The intimation, therefore, in *Regina v. Bird*, 2 Eng. Law & Eq. R. 439; 5 Cox, C. C. 11; that the mere production of a record of a former conviction of a crime which was apparently the same, or which was consistent with the crime charged in the second indictment, would be sufficient to call upon the prosecution to prove that the offence charged in the second was not the same as that charged in the first,—though cited with approbation in 3 Greenleaf, Evidence, § 36,—is not apparently in harmony with the rules of law concerning the burden of proof, when that term is correctly understood. Of course any trifling variance in the description of the offence in the two indictments, if substantially and really the same offence, will not affect the evidence for the defendant in support of his plea of the identity of the two offences. Variances in time,

place, or *mode of description*, if it be the same offence, will not be fatal. See *Rex v. Clarke*, 1 Broderip & Bingham, 478, (1820); 2 Hale, P. C. 244; *The King v. Emden*, 9 East, 437, (1808.) And if the defendant was formerly indicted by another name, or if he was charged with murdering a person having another name than that given in the second prosecution, he might still support the allegation of his plea in bar, of the identity of the two persons, by proving that he was as well known by one name as the other. *Rex v. Sheen*, 2 Carrington & Payne, 634. And in this case, the test laid down as to the plea of *autrefois acquit*,—so generally followed and adopted elsewhere, and with which we conclude the present note, was, "If the prisoner *could* have been convicted on the former indictment of the offence charged in the second, by any evidence that might have been then produced, he is entitled to an acquittal on the second charge, whether the proper evidence was or was not produced at the former trial."

E. H. B.

Ex Parte CHARLES TAYLOR.¹

October Term, 1825.

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In New York the Supreme Court have the same power as the King's Bench in England to admit to bail persons charged with any crime whatever.

A person charged with manslaughter is not entitled to bail as of course, but only in case there is reasonable doubt of his guilt.

If a warrant of commitment for the crime of manslaughter be defective, the court will not, on application for bail, discharge the prisoner, but will remand him under a special rule.

THE reporter's statement in this case, as well as his marginal notes, have been omitted, but the principal facts in this case were these: On the 19th of October, 1825, a lad of 17 years, named Eber L.

¹ 5 Cowen, 39.

Crandall, was standing near the academy in Kinderhook, in the County of Columbia. He was ordered by one of the students, a small boy, to leave the place where he was. He at first refused, but soon after went away, the student threatening to bring other boys to compel him to leave. Soon after leaving, Crandall was met in the street, at some distance from the academy, by the aforesaid student, and a larger boy. An angry conversation ensued, and a scuffle. Other students were sent for, and came; and among them was the prisoner. The school-boys all attacked the deceased, and the prisoner threw a stick at him. The deceased defended himself as well as he could. He retreated at times, and at times pursued some of the boys. At length he obtained a piece of board, with which he defended himself, and assailed his adversaries. Among others, he struck the prisoner with this piece of board, and thereupon the prisoner stabbed him with a jack-knife in the abdomen, of which wound he died.

A coroner's inquest having inquired into the case, returned an inquisition of manslaughter against the prisoner, Charles Tayloe, for the death of said Crandall, and Tayloe was committed to the common jail for the homicide, but the warrant of commitment being defective in not stating a proper cause of committal, the prisoner applied for a writ of *habeas corpus* for the purpose of being discharged on bail. Several depositions upon which Tayloe was committed, as also the coroner's inquisition, were before the court on the hearing for bail.

B. F. Butler moved that the prisoner be let to bail. He said that, at the utmost, the evidence made out a mere case of manslaughter. In applying the English practice, upon the subject of bail to this court, it would be necessary to distinguish when the books speak of the King's Bench, whose high powers this court possesses, and classes of inferior magistrates, who are numerous, and possess the power of letting to bail in certain specified cases only. No doubt many cases, or rather *dicta*, which may be cited against this application, refer to the inferior magistrate; not to the Court of King's Bench or a judge of that court, who undoubtedly possess the power, in their discretion, to bail in all cases whatsoever. 1 Chit. C. L. 98; Com. Dig. Bail. (F. 4); 2 Hale, P. C. 129; 2 Hawk. ch. 15, s. 40 and 80. The page of *Chitty*, just cited, gives the general rule in relation to manslaughter; and in *The People v. Goodwin*, (1 Wheeler's Criminal Cases, 443,) before Spencer, late chief justice, after laying down the same rule, says, (*id.* 448,) it "is adapted to all who can comply with its terms; and it is the misfortune of those who cannot give the necessary security." Several cases are there cited by the

chief justice, in which bail has been allowed upon a charge of homicide. There are three cases in Coke's Entries, 354 to 356, which were copied from the rolls of the court, by which it will be seen that the power was exercised, in the reign of Elizabeth, to bail in cases of murder. And it appears by two of these entries, that the offenders, after being bailed, were convicted of manslaughter. The book, at the pages cited, purports to be copied from rolls of the King's Bench, then in actual existence; the number of the roll is given, as well as the dates and places of the several offences, and the initials of the offenders; and it shows the power of the court to be very ancient, as well as that it will be exercised on actual indictment even for murder; not confined to cases of doubt; but where the prisoners were finally convicted. The entries are, *de gratia Curie speciali*, the offender is delivered on bail, &c., after the award of a *capias*, and an arrest. The only exception in case of manslaughter seems to be where a party is guilty by his own confession, or notoriously guilty, as the books say, which, in manslaughter, can only be upon his own confession. 2 Hawk. ch. 15, s. 80.

The counsel also cited Lisle's case, (Kelyng's Rep. Cr. Cas. 89; 1 Bulstr. 85; *The King v. Poynes*, 3 Bulstr. 113; Herbert and Vaughan's case, Latch, 12; also Selfridge's Trial, p. 8, (2d ed.) who, he said, was bailed after an indictment for manslaughter; a stronger case than this, where no indictment is found.

It would not be denied, he said, that the court might look into the depositions to see whether a manslaughter had been committed, notwithstanding the inquisition. He denied that the depositions made out manslaughter. But, at any rate, it could not but be seen, that if there was manslaughter in the case, it was of the very lowest grade. He was aware that there was no such thing as legal degrees of manslaughter; but like every other offence, it was attended with different degrees of moral turpitude; and was more various in this respect than any other crime. It presented innumerable shades, from murder, the highest offence against the life of a fellow-being, down to excusable homicide. It was upon this principle that the legislature had allowed a great latitude of discretion to the court, who are to fix the punishment; and this court are warrantable in looking to these considerations when called on to allow bail.

J. Wilcoxon, (District Attorney,) contra, relied upon *The King v. Marks and others*, (3 East, 157,) as a case in point, against bailing the prisoner. He said the King's Bench held, in that case, that they might remand, though the warrant of commitment was defective, the depositions making out a felony. In that case, the prisoners were committed on a charge of felony upon the statute against

administering, being present at, or assisting in the administration of unlawful oaths. The court looked into the depositions; and although they admitted the law to be doubtful, yet they inclined against the prisoners; and thinking that they might be guilty within the statute, they were, therefore, remanded by special rule, because the warrant was defective. The court looked to see whether a felony had probably been committed, without reference to the degree of moral guilt; and inclining that the offence made out was within the statute, they deemed it their duty to remand; leaving the question of law to be afterwards discussed upon a more full state of the facts.

Now here is a plain felony of some kind; at least a manslaughter; and we do not hesitate to say a technical murder. There can be no doubt, that this assemblage of boys, followed by the affray, was a riot; and brings the case within the rule laid down in 1 Hawk. ch. 29, s. 10, that, "if a man happen to kill another in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other, as *by committing a riot, robbing a park, &c.*, he shall be adjudged guilty of murder." Being thus engaged in an unlawful act, though Crandall had given the first blow, yet the stabbing was murder. *The King v. Oneby*, 2 Ld. Raym. 1485; Toml. Dig. 79, s. c. The offence shall not be reduced to manslaughter, unless the blow or offence be such as to deprive the party of his reasoning faculties at the time. Toml. Dig. 79, tit. Homicide, II. Indeed, there have been various convictions of murder, upon a slaying after very great provocation. 1 Hale, P. C. 455; 4 Bl. Com. 199; Kelyng, 5; *Regina v. Mawgridge*, Id. 119. And in Brown's case, (Leach's Cr. Cas. 151,) the offence was turned into manslaughter, only upon the ground that the prisoner had reason to fear his own destruction, had he not taken the life of his adversary.

If, on looking into the depositions, the court should conclude here has been a murder, clearly they will not allow bail. And so we contend if the prisoner be guilty of manslaughter. That here was a manslaughter committed, seems to be very slightly contested by the prisoner's counsel. The court are to exercise a sound legal discretion; and they will not bail even for manslaughter, unless there be very great doubt of guilt. *The King v. Marks and others*, 3 East, 157; *The People v. Goodwin*, 1 Wheeler's Criminal Cases, 443.

Talcott, (Attorney-General,) same side. We admit the power of this court, in its *discretion*, to bail in all cases whatsoever; but this discretion is judicial, and will be guided by previously adjudged cases. The rule as laid down in 1 Chit. C. L. 98, 99, is the true one;

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that "it is not usual for this court to bail, in cases of felony, unless when in consequence of the defect of the commitment, and of the examination and depositions, it appears doubtful whether any offence has been committed." A defect in the mittimus alone, has been shown not to be a ground of bail. This has not, and will not be denied.

Is this application, then, warranted by any of the adjudged cases? We agree, that in looking to these, a distinction should be kept in view between this high tribunal and the inferior magistrates, whose powers, in regard to bail, are limited; but is there a single case presenting the strong circumstances of the present against the prisoner, a plain manslaughter at least, and, beyond much doubt, a technical murder, in which bail was allowed? The rolls copied into Coke's Entries, which are relied upon, could not, in their nature, present the facts upon which the court proceeded to bail. The depositions or evidence were no part of the record. Beside the fact, that guilt or innocence hangs indifferent between the prisoner and the crown, there are various other circumstances by which the court might have been guided, in letting to bail. One is, a session past. *Fitzpatrick's case*, 1 Salk. 103. So even after conviction, where the prisoner is entitled to his clergy, he may be bailed; *Lisle's case*, id.; though this was denied in one instance. *The King v. Keat*, id. So if the prisoner's life be in danger, from imprisonment. *Lord Aylesbury's case*, id. But these and the like circumstances aside, it is enough that the evidence affects the prisoner, in the case of murder. *Anon.* 1 Salk. 104. The practice being thus settled, that it is not a matter of course to bail, leaves no doubt that in the cases cited from Coke's Entries, there must have been special grounds for the entry upon the roll, which could not appear there. In one of those very cases, the prisoner finally pleaded a pardon. This is plainly one case in which the court will bail. *Armstrong v. Lisle*, 12 Mod. 108. Indeed, they will do so in the case of an approver, who merely has a right to a pardon. *Rex v. Rudd*, Cowp. 331, 334. All these, and the like cases, are plainly exceptions to the general rule, that the court will not bail where the guilt is plain. The 2 Hawk. ch. 15, s. 80, cited for the prisoner, also supports the rule. He says if the prisoner be notoriously guilty of manslaughter, not by confession merely, as the counsel for the prisoner have it, but by confession or otherwise, he cannot be bailed. Bulstr. 85, is not at all inconsistent with this rule; and *The King v. Poynes*, (3 Bulstr. 113,) supports it strongly. *Herbert & Vaughan's case*, (Latch, 12,) presents a set of special circumstances; and Selfridge's application for bail passed without objection. *Goodwin's case* was singularly special in its circumstances; and on examining it, the court will find its general doctrine against bail in a case

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like the present. That case was once up before the sessions of New York; and Mr. Colden, the then mayor, considered it very fully, and limited the exercise of the power to bail, to the instances in which we admit it may be exercised. After an indictment for manslaughter, he held that the prisoner could not be bailed till something was shown from which he might be presumed innocent. 1 Wheeler's Criminal Cases, 435, 437. Afterwards the case came on for trial upon the indictment; the jury disagreed; and the late chief justice, in the same case, and same book, (p. 443,) considers the guilt and innocence of the prisoner, as standing so far indifferent as to warrant his being bailed. It is said in Com. Dig. Bail, (F. 3,) that the K. B. will not bail in manslaughter, unless there be a reasonable cause. Bail was denied to two English noblemen indicted for manslaughter. Styles, 371.

We have been referred, through *Goodwin's case*, to two cases in Strange, (*Rex v. Dalton*, 2 Str. 911, and *Rex v. Magrath*, id. 1242.) In *Rex v. Dalton*, we have only the dictum of a single judge, at his dwelling-house; no particular circumstances are stated; and the instance put there of *Clifton's case* sustains the right of the court to deny bail on the ground of the offence being murder, though the coroner's inquest calls it manslaughter, if the depositions will carry it beyond mere manslaughter. *Rex v. Magrath* comes to us also equally naked of all circumstances; and the only point in question was evidently, whether the court would look beyond the inquisition, in order to see the real facts. That case refers to one, for its support, in which the application was denied, (*Anon.* 1 Salk. 104,) upon the very principles for which we contend; and leaves a very fair inference that there must have been circumstances not mentioned by the reporter. Indeed, Strange's cases generally too much deserve the criticism of Mr. Justice Foster, that he is over studious of brevity, omitting many of the material circumstances upon which cases turned. When *Goodwin's case* was before the New York sessions, the mayor declared there was not a single English case cited which questioned the rule upon which he proceeded. But suppose the cases in Strange to question it; are they to sweep away the long settled doctrine upon this question, and arrest the whole current of decisions both before and since? That these cases are not now considered authority in England, in their naked state, I refer to *The King v. Jones*, (1 Barnw. & Alders. 209,) where counsel deemed it necessary to show on a mere commitment, before indictment, for a manslaughter, that the deceased fell in a fight provoked by himself. Upon this proof, the court allowed bail. That case does no more than follow up *The King v. Marks and others*, (3 East, 157,) already stated by my associate counsel. Lord Ellenborough, in that case, puts the question

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upon doubt as to the truth of the charge; and the judges all concur with him in putting the case upon its doubtful character, either in law or fact, or both.

In this view of the matter, it is not material whether the case be murder or manslaughter. The rule is the same in England as to both; for they are both capital.

If there be any distinction in this country, we then say the prisoner should not be bailed, because he is guilty of murder. The authority cited by Mr. Wilcoxon shows it a murder, if it followed a riot. That here was a riot, I refer to 1 Russell on Crimes, 354, 355; 1 East's P. C. 257, s. 33. Where homicide is committed, it will be intended to be murder, and it lies with the offender to reduce it to an inferior crime by proof on his part. It is not enough for this purpose, to say that the affair was sudden. The act must arise from a provocation legally sufficient. It must arise from a cause which overrules and controls human reason. The cause must be adequate to the effect. Wherever it appears that the crime was, at the moment, though in consequence of a sudden quarrel, deliberately and intentionally executed, the killing is murder in the first degree. *The Commonwealth v. Dougherty*, 1 Browne's Penn. Rep. Appendix, xviii.

In this case, the attack did not proceed originally from the deceased. It came from the prisoner. The deceased was almost continually on the retreat. Was it ever heard of, that the blow which is necessary for one's defence should mitigate the crime of the adversary who kills him, from murder to manslaughter? The blows which the deceased gave were mere efforts of self-defence. To mitigate the crime, they must clearly appear to have proceeded from a provocation not sought by the party. Nor is it every attack, however trifling and disproportionate, which will have this effect. The law, indeed, makes great allowance for human frailty. It will not inquire whether the precise pound of flesh has been taken. But if a man will take punishment into his own hand, it will see to it, that he shall exercise it in mercy.

It has been intimated, and how far it may hereafter be insisted on I know not, that the killing in this case was no more than mere excusable homicide. I will not detain the court by citing cases on a point so plain. Because jurors may have relaxed the rules of law in Selfridge's and Goodwin's, and other cases, these furnish no reasons for the court to do so. To reduce the crime to manslaughter, there must be a sudden affray conducted on equal terms. 1 Russell's Cr. L. 613, 646, 7, 660, 1. 1 East's C. L. 215, 234, 5, 6. 2 Ld. Raym. 1496, Foster's C. L. 295. *Brown's case*, Leach, 151. *The King v. Snow*, id. 155. *The Commonwealth v. Dougherty*, 1 Brown's Penn. Rep. Appendix, xxii, xxiii.

At a subsequent day, the attorney-general mentioned to the court 1 Chit. C. L. 113, as relating to the course the court usually take when a motion is made for the allowance of bail upon a charge of homicide.

E. Williams, in reply. When my associate counsel admitted that we cannot call upon the court to bail the prisoner as a matter of right, but of discretion, he conceded all that can be claimed. In this country, I may say, that a prisoner is, *prima facie*, entitled to bail; and it lies with the people to show circumstances, which take the case out of the rule. I knew there were English cases which might be urged against this rule; but they are more properly attributable to the extreme severity of the British penal code. It is conceded to us that this court may bail in all cases; but it is denied that they ever will do it in cases of felonious homicide, unless induced by extenuating circumstances; or rather where, from the proof, guilt or innocence appears to be indifferent. The rule, as laid down by the late chief justice, in *Goodwin's case*, is undoubtedly the true one: "That the judges will in general exercise the power of bailing in favor of a prisoner in every case not capital." 1 Wheeler's Criminal Cases, 445. Then, in all cases not capital, the power of bailing is to be exercised. If the prisoner is forthcoming to take his trial, the end of the law is answered. And the doctrine applies with peculiar force to the crime of manslaughter; which is not only never capital, under our system of criminal law, but ranges through an infinite variety of light and shade, from mere excusable homicide to malignant murder. If you disallow bail, the offender may be punished for the crime before he is tried, with a severity as great, and for a term nearly as long, as after the sentence of the law is pronounced. Suppose an homicide felonious in a mere technical sense; all but justifiable; a case in which the offender would, of course, be pardoned; ought the prisoner to be bailed either before, or after the trial? Actual pardon is seldom granted till after trial; and shall he in the mean time be confined with the same rigor as the most atrocious criminal; though it be seen that on conviction he will be pardoned of course? All this for the mere sake of form and show? The English criminal code is founded in terror; ours in reformation. It may be important in England to secure the criminal as a pageant. With us the object is to make punishment certain, in order to reform. It lies with the public prosecutor to show that the case is an exception to these principles.

It is said that, to warrant bail, the guilt and innocence of the prisoner must hang in equal scales. Who holds the scales? If the law, they are always equal. If the judge, different opinions may prevail

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at different times upon the same circumstances. If the rule be one of law, there must be some evidence to which the law can apply itself. After conviction, the matter is adjudged against the prisoner; and not till then does the law esteem him guilty, unless it be upon confession deliberately made in the face of the court. But it is here said, the crime may be substantiated in any other way. This is not so. After conviction, if there be mitigating circumstances, entitling the party to a pardon or to a new trial, he may yet be bailed; and it is here only, that the doctrine contended for against us can apply, under our mitigated system of criminal punishment. The reason having ceased with us, the severity of the English law has ceased also, as it would under their own government in a like case. Shall we demand the extravagant security of personal imprisonment, upon the mere fiction that a crime is capital, when the semblance of such a character has been legally abolished?

Are affidavits, showing the probability of guilt, enough to call for the exercise of the English rule? *Goodwin's case*, (1 Wheeler's Criminal Cases, 434,) was decided by an inferior court, which proceeded mainly upon the ground that a coroner's inquisition of murder had been found upon the case. This they considered as *prima facie* evidence that there was murder, though the regular grand inquest had found manslaughter merely. Another reason given against bail was somewhat more popular than legal; that to allow bail would be placing the poor and rich upon an unequal footing. The preference of the rich man to the poor one, pervades not only our criminal, but our civil jurisprudence. The one can give bail, or pay his debts; the other cannot, and must be imprisoned; yet, I imagine, this was never before urged as a reason why the rich man should be denied bail altogether. When the case of Goodwin afterwards came before the late chief justice, a man who was never yet accused of wanting firmness in the administration of justice, he viewed the matter in this light, and in his own clear and forcible manner laid down and vindicated the rule which we have cited, and by which we are willing to abide in the decision of this cause. It is evident from the report of Selfridge's trial, that both the court and the attorney-general of our neighboring State, Massachusetts, considered the law as perfectly well settled in favor of bail, as a matter of course upon an indictment for manslaughter. If this be a mere technical manslaughter, it is not only the right, but the duty of the court to bail. Selfridge's trial also places the law of self-defence on a very high and elevated ground; and contains all I could wish to say on the subject of the nature and mitigated character of the offence charged against the prisoner. If the act be merely rash and indiscreet, it is manslaughter; if the mere effect of passion, it is manslaughter; if deliberate,

and evincing a depraved heart, it is murder. It is not necessary that human reason should be dethroned, to reduce the act of killing below murder. The mere tilting the bench on which the prisoner sat, was, in one case, held enough; and the father, who pursued and killed the man that had abused his child, was, out of respect to human frailty, held guilty of manslaughter merely.

The counsel also considered the depositions at large; and insisted that the offence in proof did not amount even to manslaughter.

SAVAGE, C. J. The power of this court to bail in all cases of crimes punishable by our laws, is not questioned. And whether the prisoner is to be bailed or remanded, rests in the discretion of the court. That discretion is to be guided by the circumstances of the case, and a consideration of the authorities applicable to those circumstances.

The writ was allowed in this case for a defect apparent upon the face of the warrant of commitment. No affidavit, therefore, was necessary on the part of the prisoner, stating the circumstances which he might consider as entitling him to relief. But in all cases on *habeas corpus*, previous to indictment, the court will look into the depositions before the magistrate, or before the coroner's inquest; and though the commitment be full and in due form, yet, if the testimony proves no crime, the court will discharge or bail; and though the commitment be defective, yet, if the depositions contain evidence of an offence not bailable, the prisoner will be remanded.

The coroner's inquest has charged the prisoner with having committed that species of felonious homicide which is in law denominated manslaughter. This offence differs from murder, in the absence of malice.

Murder is well defined to be the voluntarily killing any person, of malice aforethought, either express, or implied by law. Manslaughter differs in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionably lenient.

The counsel for the prisoner contend that the facts, as proved by the depositions, do not amount to manslaughter; but even if they do, yet, unless the prisoner's guilt be established by his own confession, he is entitled to bail, and we are referred to several authorities on the subject, some of which I shall notice.

Hawkins, B. 2, ch. 15, s. 40 and 80. The rule, as here laid down, I take to be the correct one on the question of bail. It is this: that persons convicted of felony, or who have confessed their guilt, or are

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notoriously guilty of treason or manslaughter, by their own confession or otherwise, are not to be admitted to bail, without some special motive to induce the court to grant it. For, says the learned writer, bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial; but where that indifference is removed, it would, generally speaking, be absurd to bail him.

Two cases are cited from *Strange*, to show that bail is a matter of course in manslaughter. In *Rex v. Dalton*, (2 Str. 911,) before Lord Raymond at chambers, he is made to say, that if the depositions amounted only to manslaughter, he would bail, though the coroner's inquest had found it murder; that *Lord Mohun's case*, in Salk. 104, was in point; and that the lords bailed him after an indictment for murder.

In *Rex v. Magrath*, (2 Str. 1212,) the whole report is this: "He was committed for manslaughter; and it appearing to be no more, upon the depositions before the coroner, the court admitted him to bail, according to Salk. 104." Both these cases are supposed to be supported by *Lord Mohun's case*, in 1 Salk. 104, which was as follows: "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing, which we may look into. Otherwise, if a man be found guilty of murder by a grand jury; because the court cannot take notice of their evidence, which they, by their oath, are bound to conceal." This case, as reported, certainly proves nothing. No circumstances are given; and, for aught that appears, the court, on examining the depositions, might have been satisfied of the prisoner's innocence, or that the offence was below the degree of felonious homicide. And in *Keath's case*, (1 Salk. 103,) the same court said that, in manslaughter, after conviction, no bail is allowed till clergy had. Even *Lord Mohun's case* has, in one instance at least, been disregarded, if not overruled. In *Rex v. Acton*, (2 Str. 851,) the court refused to look into the depositions, and remanded the prisoner.

These cases from Salkeld and *Strange*, are, when fully considered, of little or no weight. Nor have they been followed in more modern times. In *The King v. Wyer*, (2 T. R. 77,) the prisoner's counsel moved that he might be bailed, on the ground that the offence charged was not felony, but the court being of opinion that the offence was felony, the prisoner was remanded. In *The King v. Marks*, (3 East, 163,) Lord Ellenborough says: "As it appears, then, from the depositions, that there is a *corpus delicti*, within the meaning of the act of parliament, which constitutes it felony, it is our duty to remand the prisoner." The other judges all concurred; and Le

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Blanc said, "If upon the depositions returned, the court see that a felony has been committed, and that there is a reasonable ground of charge against the prisoners, they will not bail, but remand them."

The cases in this country, which may be considered as authority, are but few. In *Selfridge's case*, the prisoner was bailed without opposition; but on what circumstances we are not informed. It is surely not the practice of the Supreme Court of Massachusetts to bail of course in such cases, as appears by *Trask's case*, (15 Mass. Rep. 277.) He was refused bail, as it was uncertain whether Sampson, whom he had wounded, would not die. The case of *The People v. Goodwin*, before the late Chief Justice Spencer at chambers, (1 Wheeler's Criminal Cases, 443,) was much relied on by the prisoner's counsel. The practice of bailing, as laid down by Chief Justice Spencer, is undoubtedly correct. He cites the cases from *Strange* and *Salkeld*, but does not follow them. He lays down the law from *Hawkins*, substantially, as before quoted; and upon that law he evidently acted in admitting the prisoner to bail. He says, "It appears to me, that from the facts before me, this conclusion is inevitable, that it is quite doubtful whether the prisoner is guilty. And I think it stands indifferent whether he is so or not." He alludes to the circumstances of the trial, and to the fact that the jury could not agree, from which he draws an inference in favor of the prisoner's innocence. He then adds, "In such a case, as I understand the law, he is entitled to be bailed," thus distinctly placing the exercise of his discretionary power to bail, upon the probability of the prisoner's innocence. Chief Justice Spencer does not say that persons charged with the offence of manslaughter are entitled to bail of course; but it is quite indifferent whether he is guilty. If the facts in the case now before the court afford the same presumption of innocence, and it appear to the court from the depositions, that it is quite indifferent whether he is guilty, then, in my opinion, he ought to be bailed; otherwise, not.

This necessarily leads to an examination of the testimony. I shall, however, not enter into it in detail, but merely state the substance. On the 19th of October last, Crandall, the deceased, a lad of 17, was at the academy in Kinderhook. He was ordered by one of the students, a small boy, to leave the place where he was. He refused, but soon went away; the boy threatening to bring other boys to compel him. Shortly after, the deceased was met in the street, at some distance from the academy, by the same student and a larger boy. An angry conversation ensued, and a scuffle. Other students were sent for, and came; and among them was the prisoner. The school-boys all attacked the deceased, and the prisoner threw a stick at him.

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The deceased defended himself as well as he could. He retreated at times, and at times pursued some of the boys. At length he obtained a piece of board, with which he defended himself, and assailed his adversaries. Among others, he struck the prisoner with this piece of board, and thereupon the prisoner stabbed him with a jack-knife, in the abdomen, of which wound he died.

The depositions containing these facts, show an offence which, in my judgment, is manslaughter at the least.

The contest in the books is, not whether death under such circumstances is manslaughter, but whether it is not murder.

As we think the warrant is defective, the prisoner must be remanded upon a special rule.

SUTHERLAND, J. I have very little to say in addition to the remarks made by the chief justice. The power of this court to bail in all cases whatsoever is indisputable, and was conceded by the counsel for the people. Hence, in whatever manner the court may exercise this power, it can never be alleged, that the act is void for excess. But it is important that we should be governed, as far as may be, by rules. The necessity of confiding such a power to any court is a subject of regret; but it is necessary in this as well as some other cases. It is clear, however, that the general rules which govern and confine the common magistrate in letting to bail, should never be departed from, except in extraordinary cases. Is the present case within those rules? The object of arrest and imprisonment is not to punish the delinquent; but to secure his forthcoming to abide the punishment which may be inflicted by the sentence of the law, upon conviction, as was justly remarked by the late Chief Justice Spencer, in *Goodwin's case*. Wheeler's Criminal Cases, 446-7. The principal consideration is, whether the nature of the crime be such as that a recognizance would operate to secure the prisoner's appearance. If so, it is proper to receive bail as a substitute for imprisonment. Where the punishment is directly, or in effect pecuniary merely, as by fine or temporary imprisonment for a misdemeanor, it is accordingly a matter of course to receive competent bail, proportioned to the probable amount of the ultimate penalty. There is little or no difficulty in saying what the amount should be; and it may, at any rate, be made perfectly adequate to the object. But when the punishment is either capital, or imprisonment may follow for a considerable length of time, in the state prison, at hard labor, or other degrading circumstances, for a crime involving moral turpitude, these are far different considerations; and the law proceeds upon this difference in allowing or denying bail. If capital, bail should not in general be allowed, because no pecuniary consideration can weigh

against life; and where guilt is clear, and a rigorous and disgraceful imprisonment may follow for a great length of time, the presumption is strong that the accused will not appear, and surrender himself to the demands of justice, to avoid a mere forfeiture of property. The safest course, therefore, in cases of felony, where the guilt of the criminal is clear, is to deny bail. Hawkins, (B. 2, ch. 15, s. 40,) expresses himself more clearly and correctly to this point than any other author upon criminal law. He lays down the rule in terms, that in cases of felony, bail should be allowed only where the guilt or innocence of the prisoner is indifferent. His words are, "For bail is only proper where it stands indifferent, whether the party be guilty or innocent of the accusation against him." And he follows this with the distinct proposition, that where the guilt is not indifferent, in general, it would be absurd to bail him. Several of the authorities have been considered by the chief justice; and others will be commented upon by Mr. Justice Woodworth. I shall not, therefore, go over them. I would merely observe, that I have found no case at war with the position of Hawkins. Of the two cases from *Strange*, *Rex v. Dalton*, (2 Str. 911,) and *Rex v. Magrath*, (id. 1242,) relied upon by the counsel for the prisoner, it is enough to say that there is, in the report, a total destitution of circumstances. Sufficient might, and probably did appear of the proof, to make them fit cases for bail. It is perfectly evident to me, on looking into those cases, and the cases upon which they were bottomed, that they were not reported with a view to settle the weight of proof which would warrant letting the prisoner to bail; but rather to show what kind of proof is admissible upon the return of the *habeas corpus*. *Rex v. Magrath*, gives the authorities upon which both that and *Rex v. Dalton* proceeded. These were *Clifton's case*, and *Lord Mohun's case*. 1 Salk. 104. In the first, bail was refused, because the crime was thought to be murder; although the inquisition was manslaughter. The only point decided in *Lord Mohun's case*, was, that the court would look into the depositions, upon the return of the *habeas corpus*, to see whether they warranted the finding of the inquest; and in the two cases cited from *Strange*, the attention of the reporter seems confined to this single point. He, therefore, very naturally omits to notice the degree of the proof. His object was, to show that the finding of the inquest should not be conclusive; though this would be otherwise, if an indictment had been regularly found by a grand jury; that the depositions before the coroner, being in writing, and taken publicly, may be looked into with propriety; whereas, if the finding had been by a grand jury, who had pronounced the crime to be murder, this should not be questioned, upon a motion for bail; because the evidence before the grand jury is taken orally, and in secret, and should

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not be disclosed. An indictment, found by them, is therefore very properly distinguished from the finding before the coroner. The indictment must be taken as conclusive upon the degree of the crime. The opinion of the chief justice, in *Rex v. Dalton*, wherein he says generally, that if the crime amounted to manslaughter merely, bail might be received, goes beyond the point intended to be presented by the reporter; and must be taken in reference to some facts, not mentioned by him, because he did not think them material. But if otherwise; if the chief justice intended to be understood as laying down the rule broadly, and in the abstract, that bail should be allowed of course in a case of manslaughter, his opinion is opposed to repeated authorities of more modern date. From these, I feel fully warranted in saying that we ought not to bail a prisoner, accused of manslaughter, unless there be a reasonable doubt of his guilt. *Selfridge's case* is not inconsistent with this rule. In the history of his trial, some of the circumstances which preceded it are mentioned. Among these, his actual confinement for four months previous to the indictment appears. If the practice in the State of Massachusetts was to bail of course in manslaughter, he would never have been committed at all; or would have been immediately let out on bail. True, he was finally bailed after indictment; but the particular circumstances which warranted this, are not detailed in the report. I see it was proved in the course of the trial, that the prisoner's health was very feeble. Indeed, there may have been many circumstances combined with this consideration, to satisfy the attorney-general, and the court, that no objection could be made; and what is material in weighing this authority, none was made to his being bailed.

In this case, upon the *ex parte* depositions, which we have examined, I do not think there is any rational doubt that the prisoner is guilty of manslaughter. It is true, they are *ex parte*; and, for that reason, neither the depositions nor the opinion which we give, can or ought to influence the final determination upon his guilt or innocence; but they are the only medium through which we can look at the case; and afford the only lights to guide our discretion in granting or refusing bail. We speak of them in this view. Upon the evidence before us, on which alone we can act, I think the prisoner ought not to be let to bail.

WOODWORTH, J. Had this been an ordinary case, I should have contented myself with the simple expression of an opinion. It is, however, important not only to the individual, whose liberty is involved in the decision we are to make, but as presenting several grave questions, in which the community at large have a deep interest.

These questions are, 1. On the supposition that the crime of manslaughter has been committed, can the prisoner be bailed? 2. Does the evidence before the court make out a case of manslaughter?

Upon the first question, the power of this court, in their discretion, to admit persons to bail in all cases whatsoever, was admitted upon the argument; and is abundantly proved by authority. 1 Chit. C. L. 98. 3 East, 163. It was also conceded, and the same authorities prove, that the prisoner cannot claim bail as a matter of right. The inquiry follows, in what manner is the discretion of the court to be exercised? To say that bail must be allowed of course, where it may be collected from the evidence that a felony has been committed, would leave no room for discretion, and utterly subvert the principle upon which the right to bail rests. Accordingly, the rule laid down by the later and more approved authorities is, that unless it be doubtful whether a felony has been committed; and if, from the depositions, the court can collect that a felony has been committed, they will not bail the prisoner. 1 Chit. C. L. 99. 3 East, 157. 2 T. R. 257. The court look at the depositions, to see if enough is charged to justify a detainer of the prisoner, and put him upon his trial. 1 Chit. C. L. 113. Hawk. B. 2, ch. 15, s. 80, says, "It is difficult to find an instance, where persons notoriously guilty of treason or manslaughter, by their own confession, or otherwise, have been admitted to bail, without some special motive to induce the court to grant it." And he cites 1 Roll. 268, Raym. 381, 3 Bulstr. 113. In Com. Dig. Bail, (F. 3,) it is said, "the court will not bail in treason, murder, manslaughter, &c. unless there be a reasonable cause;" and many cases are cited in support of the position. The law is laid down to the same effect in 4 Bl. Com. 299; and in *The King v. Marks*, (3 East, 165,) the rule is advanced in these cautious and qualified terms: "The court will bail, whenever there is any doubt on the law, or the fact of the case."

Indeed, the whole current of authorities in the English books sanction this doctrine; and it cannot be overthrown by a few ancient cases, where, by the report, it seems bail was allowed in manslaughter, without special cause shown. As to the cases in Coke's Entries, 354 to 356, there may, as was observed at the bar, have been important circumstances which are not disclosed; and which could not properly be disclosed by the record. The compiler does not profess to give any thing more than the mere form of the entry. We have a right to presume from the later authorities, that a proper case for bail was made out. *Lisle's case*, cited for the prisoner from Kelynge, 89, is stated generally to be a case of manslaughter; but the degree of proof is not given; and it would perhaps be sufficient to say, as of the entry in Coke, a proper case should be presumed to have been

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made out. But that case is contrary to *Dyer*, 179, pl. 42, (2 Eliz.) The words of the case in *Dyer* are: "A man found guilty of felonious homicide, before judgment, it was moved whether he was bailable, and held he was not; for the intendment of the law of bail is, that it stands indifferently whether he be guilty or not, until trial." As to the cases of *Rex v. Dalton*, (2 Str. 911,) and *Rex v. Magrath*, (id. 1242,) we are fortified in the belief that there was probably an omission to state the circumstances, by what Mr. Justice Foster says in his *Crown Law*, 294, of another case as reported by *Strange*. He complains that *Strange* was over-studious of brevity; and instances *Rex v. Tranter*, (1 Str. 499,) which, from the facts reported, seems to be a case of murder, and yet was held manslaughter; but by a report of the same case in 6 St. Tr. 195, it appears that important circumstances were omitted by *Strange*. At most, these cases in *Strange* are solitary ones, and cannot stand against the uniform unbroken current of modern authority. The rule was well settled before it came under consideration in *Goodwin's case*, decided by the late Chief Justice Spencer, (1 Wheeler's Criminal Cases, 446,) a jurist eminently deserving the encomium bestowed upon him by the prisoner's counsel. He found himself obliged to do no more than apply a rule which was well settled. He adverted to the cases in *Strange*; but was not governed by them; he uses nearly the same qualified language, which I have cited from the *King v. Marks*, (3 East, 165.) If it be doubtful whether the prisoner be guilty, or, if he may be innocent, in such case, as he understood the law, he was entitled to bail. Undoubtedly, the true rule of law is here laid down by the chief justice; and it is expressed with his usual precision and perspicuity.

The case of *Selfridge* was cited by the counsel for the prisoner. If that case had been discussed and decided by the court upon the question of bail, it cannot weigh against the English authorities and our own. But the application to admit him to bail passed without opposition. The attorney and solicitor-general are to be considered as consenting that he should be let to bail. They were in possession of all the testimony; and making no opposition to his going at large upon bail, the court might, from this circumstance alone, have inferred probable innocence. If, in the principal case, the attorney-general had arisen in his place, and stated to us that he had examined the testimony, and was convinced that it presented a question of so much doubt that bail would be proper, we should hardly have deemed it our duty to inquire further. In *Selfridge's case*, the event proved the propriety of the course which was taken. Upon the trial, the following question was submitted by Judge Parker in his charge to the jury: "Whether the accused could probably have saved himself

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from death, or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the real stress of the case." The prisoner was acquitted.

The nature of the punishment must also be regarded, in deciding this question; if guilty, the prisoner must suffer corporal imprisonment. When, therefore, the circumstances afford strong presumption of guilt, the accused, if bailed, would probably be induced to flight, in order to evade the punishment.

Again; it was argued for the prisoner, that though his case be one of clear manslaughter, yet it is at most technically so, and is, in truth, of such a mitigated character as to admit of bail. But there is no authority which warrants us, upon the question of bail, in being guided by the apparent degree of moral guilt. If it be clear that the offence has been committed, the prisoner must be remanded. The degree of criminality, or moral delinquency, to be gathered from the mitigating circumstances of the case, can be considered and weighed by that tribunal alone which is to fix the extent of the punishment.

According to the view which I have taken of the case, it becomes unnecessary to say whether the depositions make out the crime of murder; because I am perfectly well satisfied that if they show manslaughter, beyond all reasonable doubt, we ought not to bail.

2. Manslaughter is the unlawful killing without malice express or implied. 4 Bl. Com. 191. To excuse a homicide, the person killing must have no other probable means of escaping from his assailant. 4 Bl. Com. 181. "He who would excuse himself upon the foot of self-defence, must show that, before a mortal stroke given, he had declined any further combat, and retreated as far as he could; and that he killed his adversary through mere necessity." Foster's Cr. L. 277. And in such case, "it mattereth not who gave the first blow." Id. 1 Hale's P. C. 479. "The fact of killing being proved, the necessity of so doing must be proved by the prisoner, unless it appears by the evidence produced against him." 1 East's C. L. 224; Foster's C. L. 255. "If one seeing two fight, takes part with one of them, and kills the other, it is manslaughter."

The case must be tested by these principles. The tender years of the prisoner are not now in question. He is admitted to be above the age of discretion, after which he is legally capable of crime; his youth can weigh nothing except in estimating the measure of his punishment. We are under the necessity of looking into the testimony, and of making such remarks as are due to the case, upon the facts as they are now presented. If the conclusions which we express prove finally prejudicial to the prisoner, such a consequence is

to be deprecated, but it arises from his own act in making the present application.

What, then, is the case before us? I will merely glance at it, so far as may be necessary to justify the opinion we have formed. There is no reason to conclude that the deceased commenced the combat. He acted on the defensive, after Gleason approached him with the boys from the academy. A conflict then ensued between the deceased and these boys; which was, for a while, conducted by the former without the use of any weapon. His stick was laid aside; sometime after which, he obtained a piece of board, with which he defended himself. While thus employed, the prisoner voluntarily, and unnecessarily, engaged in the affray, joining the combatants in hostility to the deceased; and, indeed, must be considered as making the first assault. If not, how came he engaged? It is true that the deceased struck him with the piece of board; but there is no evidence that his life was in danger, or that great bodily harm was likely to ensue, either from the blow, or the instrument made use of. It does not appear that the prisoner retreated, and was pursued by the deceased; or that the deceased struck the prisoner more than once. It does not appear that the weapon would probably produce death, nor, by the effect produced, that great bodily harm was experienced by the prisoner.

On the law and the facts before us, therefore, I concur in the opinion that the application to let the prisoner to bail must be denied; and this on the ground that the depositions present a case of manslaughter, at least, clearly made out.

RULE.

Supreme Court, in the Matter of CHARLES TAYLOE.

Charles Tayloe being brought into court, in custody of the keeper of the gaol of the county of Columbia, by virtue of a writ of *habeas corpus*, it is ordered, that the said writ, and the return made thereto, be filed; and upon reading the several depositions taken before Lucas Hoes and Barent Hoes, justices of the peace in and for the said county of Columbia, and their warrant of commitment thereupon; and also the depositions taken before Samuel Clary, a coroner in and for said county, upon an inquest taken upon the body of one Eber L. Crandall; and the inquisition found by the jury, and upon hearing counsel as well for the people as the prisoner, it is ordered, that the said Charles Tayloe be discharged from his imprisonment by virtue of the warrants in said return mentioned; and that he, the said Charles Tayloe, be re-committed to the said keeper of the gaol of the county of Columbia aforesaid, for unlawfully, wickedly and

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feloniously stabbing and killing the said Eber L. Crandall, on or about the nineteenth day of October last past, at Kinderhook, in the said county of Columbia, to be, by the said keeper, kept in safe custody, without bail or mainprize, until he shall be thence discharged by due course of law.

Ex parte BARONNET and others.¹

November 3, 1852.

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Where a person has been committed upon a charge of wilful murder, found by a coroner's jury, upon evidence sufficient to support the finding, this court will not admit him to bail, especially where the accused has made a statement admitting his participation in the affair out of which the charge of murder arises.

THIS was a motion for a writ of *habeas corpus* for the purpose of admitting to bail Etienne Baronnet and Edmond Allain, who had been committed for trial on a charge of wilful murder, and for a writ of *certiorari* to bring up the depositions taken before the magistrates and coroner of Surrey on their committal.

It appeared by the affidavits that the prisoners were natives of France, who had been exiled from thence in consequence of political offences, and who had resided in England since the beginning of the present year. The present charge arose out of a duel which recently took place, near Egham, between two Frenchmen, and which ended in the death of one of them, M. Courmet. The depositions (a copy of which was verified by affidavit) stated the following facts: On the 19th of October, about half-past 12 o'clock, a laborer, named Herbert, heard several persons talking very loud in a meadow near the road between Egham and Windsor, and shortly afterwards heard the report of a pistol, and then a man hallooing as if for assistance, and another answering in the same language. He then saw a person (whom he could not identify) run under the hedge and across the field into the road, where he met a surgeon, Mr. Hayward, and brought him back to the gate where the witness was. Mr. Hayward and Herbert went across the meadow, and there found the deceased

¹ 16 Eng. Law & Eq. R. 361; 1 Pearce, C. C. 51; 1 El. & Bl. 1.

lying on his back, and the prisoner Allain kneeling beside him. Mr. Hayward identified the person who met him in the road as the prisoner Baronnet, who said that his friend had been wounded by a pistol, and asked him to accompany him to the spot, which he accordingly did. He also spoke to Allain as being the person whom he saw assisting the deceased. Five minutes before he had met Baronnet he saw three foreigners come out of a gate communicating with the place where he found the deceased, and go along the road. One of these asked him the way to Windsor. He believed, but would not swear, that two of these were Eugène Phillippe Mornet and Antoine Barthélemy. The police constable who took the prisoners into custody found upon Allain a powder-flask, some bullets and copper caps, and the half of a return ticket, dated the 19th of October, from the Waterloo station to Windsor, and a similar railway ticket in the pocket of the deceased. In consequence of information given by Mr. Hayward, it was ascertained that three foreigners, who afterwards proved to be Baronnet, Mornet, and Barthélemy, had left Windsor for London by the 25 minutes past two o'clock train. The electric telegraph was used to convey a description of them to London, (the principal points being that their trowsers and boots were muddy, as if they had been walking in the wet and afterwards in the dust,) and the prisoner Baronnet and MM. Mornet and Barthélemy were detained as they got out of the train at London. Under Mornet's cloak were found two swords rolled up. It further appeared that the deceased died from a wound caused by a bullet. A witness also deposed to having seen six foreigners (four of whom were Baronnet, Allain, Mornet, and Barthélemy) go over into a field near the road at about a quarter past twelve on the morning in question. It also appeared that on the evening of the 18th of October, Allain had hired from a shooting gallery a pair of pistols, which were sealed up and delivered to another foreigner. When the prisoners were before the magistrates, and after they had been cautioned in the terms of the act of parliament, a written declaration by Baronnet and Allain was put in, which contained the following admission of their part in the affair:—

“ Quelles que soient pour moi les conséquences de la sévérité de la loi Anglaise sur le duel, et que j'ignorais, je déclare que j'ai été le 19e de la mois le témoin de M. Courmet

BARONNET.

“ J'adhère à cette déclaration ; elle est conformée à mes sentimens.

E. ALLAIN.”

The affidavits of the prisoners stated that the duel was conducted

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in the fairest manner, and that they were ignorant that, according to the law of England, it was any offence to be second in a duel, which they believed it is not according to the laws of France; and they pledged themselves, if admitted to bail, not to quit England, but to surrender themselves, and take their trial for the offence for which they were committed.

Chambers, in support of the motion. This is a very important question, and one which has never yet been directly decided, whether, upon proper grounds being shown, parties committed under these circumstances, will not be admitted to bail.

[LORD CAMPBELL, C. J. This is the first time the court has ever been called upon to admit to bail, upon a charge of wilful murder.]

It is contended that the court will not act on a different principle in admitting to bail, whether the offence be of the highest or lowest degree. The rule is, that unless there appears to be a probability that justice will be defeated, a person ought not to be deprived of his liberty. In *The Queen v. Scaife*, 9 Dowl. P. C. 553; s. c. 10 Law J. Rep. (N. S.) M. C. 144, Coleridge, J., says: "I conceive that the principle on which parties are committed to prison by magistrates previous to trial is for the purpose of ensuring the certainty of their appearing to take their trial. It seems to me that the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. It is on that account alone that it becomes necessary to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy." In the recent case of the Six Mile Bridge affair in Ireland, parties were admitted to bail where they were charged by the coroner's inquisition with wilful murder.

[LORD CAMPBELL, C. J. There was there no admission of their guilt, as here.]

That is immaterial if the only reason for imprisoning before trial is to secure the party's appearance at the trial.

[LORD CAMPBELL, C. J. Must we not look to the punishment awarded by law for this offence?]

Not if the court is satisfied that the due course of justice will be secured. These gentlemen are exiled from their country, and cannot therefore quit England without the certainty of being punished if they go to France. Moreover, in the case of foreigners, ignorant of the difference between our laws and their own in regard to duels, it may be presumed that a more lenient and humane administration of the law would be adopted in the event of a conviction. There is a case to be found in the Annual Register for 1782, under the dates

of the 26th of June and the 6th of July, where a Rev. Mr. Allen was apprehended and committed to Tothill Fields Bridewell on a charge of murder of Mr. Dulany, arising out of a duel, but who appears afterwards to have surrendered and taken his trial. It is quite evident, therefore, that he must have been bailed in the interval. In *Lord Cardigan's case*, also, he was admitted to bail, and in this respect there is no greater privilege for a peer of the realm than for the meanest subject.

LORD CAMPBELL, C. J. I am clearly of opinion that no ground is laid to justify us in interfering by bailing these prisoners. For obvious reasons I shall say as little as possible, but I consider it my duty, after what has fallen from the learned counsel, to make a few observations. These prisoners are placed in the same situation; and will have the same justice as if they were native-born subjects, and were in the highest station. I am firmly convinced that if any person, whatever his station might be, were charged by a coroner's jury with wilful murder in a duel, and had confessed that he was an accessory to that duel, it would be in vain to apply to have him admitted to bail. We are to look, as stated most forcibly by my brother Coleridge, in the case referred to, to the seriousness of the charge, the nature of the evidence in support of it, and the severity of the punishment awarded by law for the offence. It cannot be supposed that the court will try by a preliminary application on affidavits whether the duel was fair or not. It would lead to most inconvenient consequences if this were to be done, and in many instances it might prejudice the party accused; therefore, we can only look to the fact of this being a capital charge, and that there is a confession of these parties. Can it be said, that if this confession were given in evidence the jury would not, in all probability, arrive at a verdict of guilty? Although I trust that the extreme sentence of death may be avoided, it must necessarily be pronounced by the presiding judge. Sitting here, we cannot inquire whether there are circumstances of mitigation, as if we were advising the crown after the verdict had been given; that would be a departure from our duty, and no authority has been cited for such an application as the present. The case in the *Annual Register* is much too loose for us to act upon. We do not know whether the party there was actually bailed or by whom he was bailed. It may have been by a magistrate who exceeded his duty in so doing. As to the *Six Mile Bridge case*, that has no resemblance to the present question. There, according to all the evidence, the verdict was without any pretence for the finding, and the parties committed, instead of admitting their guilt, strongly protested against that conclusion, and showed that they had only acted in self-

defence. I am, therefore, of opinion that these gentlemen must remain in custody. Although they are foreigners who have sought refuge in this country, they must obey its laws just as much as if they were subjects of the realm. They will have a fair trial, and will be entitled to a jury *de medietate linguae*. I can only wish them a good deliverance. But if they are found guilty, they must throw themselves upon the mercy of the crown, with whom alone it rests to prevent sentence being carried out.

COLERIDGE, J. I am entirely of the same opinion, because I think that if we granted this application, and the same argument as has been urged before us to-day were used when the prisoners were brought up, we should be bound to remand them. It is not necessary to say much in addition to what has already fallen from Lord Campbell, except as to the case of *The Queen v. Scaife*, which has been relied upon. I still adhere substantially to what I am there reported to have said. A party is committed for trial because there is a probability that he would otherwise not appear, and not because he is presumed to be guilty of the offence charged against him. This court has an unlimited power of admitting to bail, and since the 5 & 6 Will. IV. c. 33, s. 3, even magistrates may admit to bail after parties have confessed the offence with which they are charged. After that enactment, therefore, it cannot be said that guilt confessed is of itself a ground for refusing bail; and the statute also shows that it is not on the ground of a presumption of guilt alone that a party is committed for trial. In the words of the statute, it is to prevent the due course of trial being interfered with. But the quality and circumstances of the charge must be some element in deciding whether it is to be fairly presumed that the party accused will appear to take his trial. Accordingly, the three elements which I mentioned in the case referred to, the seriousness of the offence, the strength of the evidence, and the weight of the punishment, are those generally taken into consideration in deciding whether there is such a presumption or not. Here we have a charge of wilful murder, a confession of the prisoners, and the fact of its being a capital offence. Under these circumstances, the presumption has always been that no amount of bail will secure the due course of justice; and, except under very special circumstances, the court do not admit to bail. It is said that, because these parties are foreigners, there is a probability of the sentence of death not being carried into effect in case of a conviction, and we are called on to act differently upon that ground. I quite agree with what has been said by Lord Campbell, that a foreigner who claims the benefit of a shelter in this country must stand precisely on the same footing as a native in respect of a breach of

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the law, and if we allowed this as a ground for admitting to bail, we should be bound to take into consideration equally in the case of a native subject, who alleges his innocence. It would be quite improper for us to enter into any such speculations. We can only look to the punishment awarded by law for the offence.

WIGHTMAN, J., concurred.

ERLE, J. I think that it is the duty of the court to refuse this application. The principle has been fully laid down already, that where a crime is of the highest magnitude, the evidence in support of the charge strong, and the punishment the highest known to the law, the court will not interfere to admit to bail. Where either of these ingredients is wanting, the court has a discretion which it will exercise. As to any exception being made in the case of a foreigner, it is most necessary that the administration of the penal law should be uniform, and it would be most inconvenient to allow any such exception to prevail.

Application refused.

Ex parte BARTHÉLEMY and another.

On a subsequent day, (November 23,) Huddleston made a similar application on behalf of the two other prisoners, Eugène Philippe Mornet, and Antoine Barthélemy. There is a distinction between this application and that already disposed of, as there has been no statement made by these parties admitting their participation in the duel. This difference is observed by Lord Coke, 4 Inst. 178: "A man arrested or imprisoned, (and bailable,) for felony shall be bailed before it appeareth whether he be guilty or no. But if a man be convicted by verdict or confession, &c., he is not bailable, because it appeareth that he is guilty. So, if upon examination, a man confesseth a felony, if the *mittimus* be for felony confessed, he cannot be bailed." *The King v. Cary*, 3 Bulst. 206.

[LORD CAMPBELL, C. J. Do these prisoners make any affidavit denying their guilt?]

That is not necessary, as the court would not try on affidavit the question of their guilt or innocence. Even where there is evidence to support the charge, the practice has been to admit to bail, if the court can see that the accused parties will take their trial at the proper time. The mere fact of this being a capital charge is not sufficient to prevent the application being granted. In the case of Col. Fawcett's duel, in 1843, Mr. Gulliver, who was committed by the coroner for murder, was bailed by Coleridge, J., and he was after-

wards tried and acquitted, and admitted as a witness against Lieut. Cuddy, who was also acquitted. *Lord Cardigan's case*, 1840, is another instance. He was charged with shooting at Capt. Tuckett with intent to murder, and had admitted that he had fought a duel and hit his man. A bill having been found against him at the Central Criminal Court, Bosanquet, J., on an application, enlarged the recognizances until the trial. *Egerton v. Morgan*, 1 Bulst. 69, is a very strong case; there was an appeal of murder as well as an indictment for murder, and an application being made by the prisoner to be bailed "the court made answer unto him, that they would be advised further of this, and so caused precedents to be searched in such a case, and if there be any such former precedents to be found, then he should be bailed. Waterhouse, clerk of the crown and officer of the court, informed the court that they had made search for precedents, and that they had found some precedents directly in point, that in such a case a prisoner might be bailed. The court answered, that they would see and peruse the same precedents, for now the prisoner stands arraigned and indicted of murder." Afterwards the court was again moved to bail him, and "by the opinion of the whole court, Morgan, the prisoner, is here well bailable; and the court did all agree to bail him."

[LORD CAMPBELL, C. J. I do not know that it has been ever doubted that the court has power to bail on a charge of murder.]

It was intimated on the former occasion, that no instance could be cited where a party had been admitted to bail after a fatal duel. These precedents show that it has been done. Then, as to the evidence on the depositions. [He referred to the evidence as stated above.] There is no such case here made out against these parties as will induce the court to refuse bail. *Regina v. Chapman*, 5 Car. & P. 558, was also cited.

[LORD CAMPBELL, C. J. We are not bound to refuse the application because we refused the former one. We will look at the depositions.]

Cur. adv. vult.

On the following morning

LORD CAMPBELL, C. J., said: We have looked at the depositions both before the magistrates and the coroner, and are of opinion that we should not be justified in yielding to the application. It appears that there is an inquisition good on the face of it, finding that these prisoners are guilty of wilful murder. Looking to the depositions, the charge appears to have originated out of a duel, and we think that there is evidence to support the finding of the coroner's jury. We give no opinion whether the evidence is conclusive or not,—as

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in the former case we say, God send them a good deliverance. But these persons are in the same situation as those against whom a grand jury has found a true bill for wilful murder, and in that case it is quite plain we ought not to admit to bail. Whether we should interfere where there is no evidence to warrant the finding of the grand jury, we need not now determine, because here there was evidence, and we cannot say that the finding was wrong. Therefore, it would be contrary to all the principles on which this court has uniformly acted, if we were to grant a *habeas corpus*. It would be calling upon us to make a distinction between murder arising out of a duel, and out of any other transaction, which would be most inexpedient. The time was when the public feeling ran counter to the law of the land in this respect. But now it happily corresponds with it, and I trust that the day is not far distant when the practice will be entirely at an end.

Application refused.

There is no doubt but that at the ancient common law all offences, including treason, murder, and other capital felonies, were bailable at the discretion of the court. Indeed, the power to try, acquit, and finally discharge a prisoner seems to imply, as necessarily incident thereto, a power in the same court to admit to bail or temporarily discharge a person accused of any crime. The authority to set free unconditionally must include the right to do so with a promise of return. Whatever the origin of the power, it is clearly sustained by the authorities on this subject. See 4 Black. Com. 298, 299; 2 Hale, P. C. 129; 1 Chitty, Crim. Law, 93; *Barney's case*, 5 Modern, 323; *Egerton v. Morgan*, 1 Bulstrode, 69; *Rex v. Marks*, 3 East, 157, (1806.) And in this country in the absence of any constitutional or statutory provision limiting the common-law right, the power to admit to bail in capital cases has been frequently acted upon, or directly recognized. See 1 Burr's Trial, 306, 312; *The United States v. Hamilton*, 3 Dallas, 18, (1795); *The State v. Rockefeller*, 1 Halsted, 332, (1796); *The State v. Hill*, 1 Constitutional Court R. 242, (1812); *The State v. Wicks*, R. M. Charlton, 139, (1822); *The State v. Abbott*, Id. 244; *Commonwealth v. Semmes*, 11 Leigh, 665, (1841); *The Peo-*

ple v. Smith, 1 California R. 9, (1850); *The People v. Van Horne*, 8 Barbour, 158, (1850,) an elaborate case on this subject. *The People v. Hylar*, 2 Parker, C. C. 570, (1855.) Although by all these authorities, murder was a bailable offence at the early common law, some elementary writers on criminal law have declared that this crime was afterwards excepted by statute. Thus Blackstone says, (4 Black. Comm. 298,) "By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute." Chitty, in 1 Criminal Law, 93, uses similar language. And see 2 Com. Dig. Bail, F. 1. Coke's 2d Inst. 186. But this remark may be intended to apply only to the power of magistrates to admit to bail; which doubtless was not as extensive as that of the Court of King's Bench. Indeed, the power of the latter court to admit to bail in such cases is said by Lord Campbell in *Barthélemy's case*, 16 Eng. Law and Eq. R. 367, *ante*, 586, never to have been doubted. And unless such a power was well known and recognized in England, we should not probably have heard of the application in the case of the duels, before mentioned. See also 2 Gabbett's Crim. Law, 173. Although the power clearly exists in England at the present day, even after conviction, it is seldom ex-

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exercised. Bail is not usually granted there, after the grand jury have returned a bill of indictment charging the crime of murder. *Regina v. Chapman*, 8 Carrington & Payne, 558, (1838); *Regina v. Guttredge*, 9 Id. 228, (1840.) It has been done, however, where the prisoner was in such ill health, that his life would be in danger from continued close confinement. *Lord Aylesbury's case*, 1 Salkeld, 103. And the same reason has frequently been deemed sufficient in this country. *The United States v. Jones*, 3 Washington, C. C. 224, (1813); *Commonwealth v. Semmes*, 11 Leigh, 605, (1841); *Commonwealth v. Archer*, 6 Grattan, 705, (1849.) But mere ill health, when of a constitutional nature, not endangering life, or if produced by the act of the accused himself, has been declared not sufficient cause to admit to bail, in cases of felony. *Rex v. Wyndham*, 1 Strange, 4; *Kirk's case*, 5 Modern, 454.

In this country the constitution of many States provides that "all prisoners are bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great." And this question is to be determined by the court who have power to admit to bail. The prisoner has a right to bail if the offence is not capital, or if capital, and the evidence is not sufficient to create a great presumption against him. *Albery v. The Commonwealth*, 8 B. Monroe, 5, (1847); *Wray, ex parte*, 30 Mississippi, 673, (1856.) Under this provision it has been declared that if on application for bail the evidence against the prisoner be of so weak a character that it would not on his trial sustain a verdict of guilty, it is a clear case when he ought to be admitted to bail, even after indictment found. *The State v. Summons*, 19 Ohio, 139, (1850.) In those States where no such provision exists, the application for bail, certainly in cases of felony, is addressed to the discretion of the court, who have the power to bail in all offences, as incident to the power to hear and determine the offence charged. This power is to be governed, however, by the circumstances of each case, and the rules of law applicable thereto. It may be exercised

after indictment, as well as before; the indictment not being conclusive evidence of guilt. *The People v. Van Horne*, 8 Barbour, 164, (1850); *Commonwealth v. Rutherford*, 5 Randolph, 646, (1826.) It may also be exercised, upon a sufficiently important case, even after conviction. See *Davis v. The State*, 6 Howard, (Miss.) 402, (1842.) In *The State v. Conner*, 2 Bay, 34, (1796,) it seems to have been thought that after conviction, courts had no power to bail except in minor offences. In those States where the constitution so provides, this clause is sometimes understood to take away the power of admitting to bail, otherwise belonging to the court, if the crime is capital, and the proof is evident or the presumption great. In those cases courts have, it is said, now no power to bail. *Commonwealth v. The Keeper of the Prison*, 2 Ashmead, 227, (1838,) an excellent case on this subject. But *quære*—whether the discretionary power does not still remain, even if the offence is capital, and the proof evident? See *Wray, ex parte*, 30 Mississippi, 673. For all offences not capital, the constitutional provision, before cited, is understood to give a prisoner an absolute right to bail, at least, before conviction. *Wray, ex parte*, 30 Mississippi, 673, (1856.) But after conviction, it is said still to be a matter of discretion with the court to admit or refuse bail. *The State v. Ward*, 2 Hawks, 447, (1823.)

The right to bail also implies a right to reasonable bail, and indeed by the Constitution of the United States as also by those of most of the individual States, magistrates are forbidden to require "excessive bail," an adoption of the right secured in England by 1 William & Mary, stat. 2, ch. 2. But even at the common law, it was a misdemeanor to exact excessive bail, as it tended to deny public justice. 1 Chitty, Criminal Law, 103; *Regina v. Tracy*, 6 Modern, 178. The remedy, however, being by indictment or information, and not by action on the case, unless, indeed, positive malice could be proved. *Evans v. Foster*, 1 New Hampshire, 374; *Linford v. Fitzroy*, 13 Queen's Bench, 240;

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it being a judicial act, and not a merely ministerial one; for it is a familiar principle of the common law, that no action will lie against a magistrate for doing or not doing an act of a judicial nature, without proof of malice. The object of taking bail being to secure the attendance of the party accused, to answer to the indictment and to submit to a trial and the judgment of the court thereon, it follows of course, that a forfeiture of a recognizance, even if the bail be proceeded against and compelled to pay the amount, is no bar to the indictment; the accused is still liable to be arrested, and tried for the charge. *Ex parte Milburn*, 9 Peters, 704, (1835.) *Commonwealth v. Thompson*, 3 Littell, 284. This being the object of a recognizance, the test whether a party ought to be bailed, where bail is a matter of discretion, has been said to be, whether it is probable the party will appear to take his trial. To determine that, the court cannot go into the question of his character or behavior at a particular time, but should ask, what is the

nature of the crime charged? Is it grave or trifling? What is the probability of a conviction? What is the nature of the evidence to be offered by the prosecution? Is the party liable to a severe punishment in case of a conviction? See *Robinson, in re*, 25 Eng. Law and Eq. R. 216, (1854.) The same considerations are worthy of attention in fixing the amount of bail.

The mode of taking bail, as well as the persons by whom, and the crimes for which, bail may be taken, is generally regulated by statute, and an exact compliance therewith is considered necessary to render the proceedings valid, and the recognizance binding. But a further consideration of this subject, and the mode of proceedings upon recognizances is foreign to the object of this note. That the personal opinions, or character of those offered as bail cannot be inquired into, provided they are of "sufficient ability," was declared in *Regina v. Badger*, 4 Queen's Bench, 468; 1 Leading Criminal Cases, 236.

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3. *Indictment—Larceny.*] Upon an indictment for burglariously breaking and entering a dwelling-house, and stealing goods therein, the prisoner may be convicted of the burglary, if the larceny be proved. *Jones v. The State*, 46.
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1. *Of a Misdemeanor.*] The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. *Keir v. Leeman*, 258.
2. Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff, and riot, and of an action for wrongful levy under a *fi. fu.*, which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the *fi. fu.*, is altogether invalid, as grounded on an illegal consideration. *Ib.* Although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial. *Ib.*

CONFESSIONS.

1. A police constable, who apprehended a man on a charge of murder, having told him the nature of the charge against him, said "he need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him." The prisoner thereupon made a confession. *Held*, that the confession was rightly admitted in evidence. *Regina v. Baldry*, 164.
2. *Rex v. Drew*, 8 Carrington & Payne, 140; *Rex v. Morton*, 2 Moody & Robinson, 514; *Regina v. Furley*, 1 Cox, C. C. 76; and *Regina v. Harris*, *Ibid.* 106, are overruled. *Ib.*
3. *Burden of Proof.*] In order to render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement; if this appear doubtful on the evidence, the confession ought to be rejected. *Regina v. Warringham*, 167.
4. *Inducement—by whom.*] On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible. *Ib.*
5. The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions. *Regina v. Moore*, 178.

CONSIDERATION.

Illegality of.] See *Keir v. Leeman*, 262.

CONSPIRACY.

To commit a Larceny—not merged in the Larceny.] See MERGER.

CONSTITUTION OF THE UNITED STATES.

Secures a Jury Trial—Meaning of the Term.] See TRIAL BY JURY.

CONSTRUCTIVE POSSESSION.

See LARCENY, 3.

CONTEMPT.

Of Court.] See *Piper v. Pearson*, 284.

CONTRACT.

Illegal.] See *Keir v. Leeman*, 262.

CONVICTION.

On an indictment for larceny, the defendant, if acquitted of the felony, cannot be convicted of a misdemeanor. *King v. Westbeer*, 454.

COUNTS.

Defects in one, aided by another.] See *Regina v. Waters*, 69.

COURT.

Question for—to admit Dying Declarations.] See DYING DECLARATIONS, 1.

CRIMES.

When may be compromised.] See *Keir v. Leeman*, 262.

What is not a Crime.] See *Regina v. Eagleton*, 88.

DIFFERENT OFFENCES.

See FORMER ACQUITTAL, 2.

DISAGREEMENT.

Of Jury—Good Cause for their Discharge.] See *United States v. Perez*, 357, and note.

DISCHARGE.

Of a Jury before Verdict—Effect of.] See NEW TRIAL, 1, 2.

DIVISABLE AVERMENTS.

See *Rex v. Hall*, 134.

DYING DECLARATIONS.

1. *Question for the Court.]* Whether or not the declarations of the deceased were made under an apprehension of danger must be determined by the judge, in order to receive or reject the evidence, and not by the jury after the evidence is received. *Rex v. John*, 232.
2. *Apprehension of Death.]* The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound, or illness, or other circumstances indicating the same. *Ib.*
3. *Only in cases of Homicide.]* Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and, on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose:—*Held*, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. *Rex v. Mead*, 234.

ERROR.

To Try or Sentence a Person in his absence.] See *Sperry v. Commonwealth*, 449, and note.

See GRAND JURY, 3.

EVIDENCE.

1. *Character.]* In capital trials, the prisoner may give his general character in evidence, after which the prosecutor may call witnesses to disprove such testimony. *Commonwealth v. Hardy*, 158.
 2. *Of Accomplice.]* The information of a dead accomplice may be read in evidence against a prisoner. *King v. Westbeer*, 454.
- Rule that the best must be produced.]* See *Commonwealth v. James*, 139.
- See DYING DECLARATIONS; HUSBAND AND WIFE; MURDER; WITNESS.

FALSE PRETENCES.

1. *Private Fraud.]* The defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times as the guardians

should direct, loaves of bread of three and a half pounds weight each. The guardians were, during the said term, to pay the defendant after certain rates and prices for the bread so supplied, and of which a bill of particulars should have been sent. The contract contained a proviso, that in case the defendant broke the terms of his contract in any of the ways therein named, one of which was by a deficiency in the weight stated and charged for in the said bill of particulars, the guardians might employ other persons to supply the bread, and charge the defendant with the costs of such supply above the price contracted for, and might retain any moneys due to the defendant under the contract at the time of such breach, towards such costs, or the damages which the board might sustain, and might also put in suit against the defendant a bond which he then executed, and which was conditioned for the due performance of his contract. The indictment contained ten counts, the first seven of which were in substance the same, and charged the defendant with a common-law misdemeanor, in supplying and delivering, as such contractor, loaves of bread to different poor persons, which loaves were deficient in weight, intending to injure and defraud such poor persons and to deprive them of proper and sufficient food and sustenance, and to endanger their healths and constitutions, and to cheat and defraud the said guardians. The last three counts charged the defendant with attempting to obtain money from the guardians by falsely pretending to the relieving officer that he had delivered loaves of the proper weight.

It was proved in evidence, that on a poor person applying for relief, the relieving officer gave the applicant a ticket, the presentation of which to the defendant entitled him to receive a loaf; that the defendant received these tickets and gave to the poor persons presenting them, loaves of bread which the jury found were deficient in weight, and were so with the knowledge of the defendant. By the course of dealing the defendant would return the tickets in the following week, with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant in account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. The tickets were so returned by the defendant, and he was credited in account accordingly; but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor, and that by returning the tickets to the relieving officer, he intended to represent that he had delivered the loaves mentioned in them, of the weights stated.

Held, 1. That the first seven counts did not disclose an indictable offence, as the delivery of loaves of less weight than that contracted for was a mere private fraud, no false weights or tokens having been used. *Regina v. Eagleton*, 88.

2. *Attempt to obtain Money.*] That the defendant was properly convicted on the three last counts of attempting to obtain money by false pretences, as the fraudulent representation made was of an antecedent fact; and that although the defendant had only obtained credit in account, and could not have been convicted of obtaining money by false pretences, he was nevertheless properly convicted of the attempt, his obtaining the credit in account being the last act depending on himself towards obtaining the money. *Ib.*

3. *Quære*, whether a sale of goods with a false representation of the weight or quality is an indictable offence? *Ib.*

4. *False Account.*] A workman employed by clothiers was to keep an account of the number of shearmen employed, and the amount of their earnings and wages, which he was weekly to deliver in writing to a clerk, who paid him the amount. He delivered in a false account, charging for more work and of other men than done, by which he obtained a larger sum than was due. This is obtaining money by a false pretence within the 30 Geo. 2, ch. 24; because without the false pretence he would not have obtained the credit; and is not like a case of money paid generally on account. *Rex v. Wittell*, 109.

5. *Proof of only part.*] Upon an indictment for obtaining money by false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by that part, is sufficient. *Rex v. Hall*, 134.

FELONY.

Conviction of only a Misdemeanor.] See CONVICTION.

Does not merge a Misdemeanor.] See MERGER.

FINDING.

Lost Property.]

See LARCENY, 1, 2.

FOREIGN CONVICTION.

Effect of.]

See WITNESS.

FORMER ACQUITTAL.

1. *Insufficient Indictment.*] A former acquittal upon an insufficient indictment is no bar to a second prosecution for the same offence. *Regina v. Vaux*, 539.
2. *Different Offences.*] On a charge of burglary accompanied with a larceny, if the burglary be disproved, the prosecutor, to sustain the charge of larceny, cannot prove a larceny at a prior time, and on a different occasion from the alleged burglary. *King v. Vandercomb*, 542.
3. A prisoner is not entitled to a copy of his indictment, to enable him to plead *autrefois acquit*. *Ib.*
4. The plea of *autrefois acquit* must state the record of acquittal. *Ib.*
5. A former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted thereof under the first indictment, upon proof of the facts averred in the second. *Ib.*
6. A plea of *autrefois acquit* on an indictment for a burglary and actual stealing certain goods, is not a bar to a subsequent indictment for burglary with *intent to steal* the same goods; for the two are not the same offence. *Ib.*

See NEW TRIAL. *Campbell v. The State*, 498.

FRAUD.

See FALSE PRETENCES.

GOOD CHARACTER.

When competent Evidence.]

See EVIDENCE, 1.

GRAND JURY.

1. *Number of.*] A grand jury ought not to consist of more than twenty-three persons. *King v. Marsh*, 317.
2. Where more than twenty-three persons are sworn and sit upon a grand jury, and a bill of indictment is found by them to which a defendant pleads, and is tried and found guilty, the Court of King's Bench will not upon motion quash the indictment. *Ib.*
3. *Writ of Error.*] If more than twenty-three are sworn and sit upon the grand jury, the defendant, in an indictment found by them, may, if that fact appears upon the caption of the indictment, bring error in law. If it does not appear there, then he may bring error in fact. *Ib.*
4. The Court of King's Bench will not receive an affidavit of a grand juror as to what passed in the grand jury room, upon the subject of a bill of indictment. *Ib.*

HARBOR.

See NUISANCE.

HIGHER AND LESS OFFENCE.

See CONVICTION.

HOMICIDE.

See DYING DECLARATIONS, 3; MURDER.

HUSBAND AND WIFE.

Witnesses for or against each other.] On a question of settlement, the pauper having been removed to her maiden settlement, respondents called A. to prove her marriage with C., in order to get rid of the effect of a subsequent marriage of C. with the pauper. *Held*, that A. was a competent witness, for C. not having been called as a witness, she did not contradict him, and her evidence could not be used to criminate him. *Rex v. All Saints*, 244.

INDICTABLE OFFENCE.

What is not.]

See *Regina v. Eagleton*, 88.

INDICTMENT.

1. *Aider by Verdict.*] The prisoner was charged in the first count, "that she in and upon a certain infant female child born of the body of her the said S. W. and of tender age, to wit, of about the age of two days, and not named," feloniously made an assault, &c., and caused to take poison, and so murdered her. In the second count, "that the said S. W. in and upon the said infant female child so born of the body of her the said S. W. and not named as aforesaid, &c., feloniously did make an assault, and that she, the said S. W., the said infant female child in and upon a heap of ashes, &c., wilfully, &c., did cast, &c., and did then and there leave the said infant female child, &c., in the open air, &c., exposed to the cold air, &c., of which said exposure and of the chilling thereby caused, the said infant female child then and there died, and so, &c." *Held*, 1. That there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot. *Regina v. Waters*, 69.
2. That the words "said infant female child so born of the body of her the said S. W." did not incorporate by reference the description of the child given in the first count, namely, that it was of tender age. *Ib.*
3. That the second count was, therefore, defective in not showing that the child was able to take care of itself. *Ib.*
4. That had the act of the prisoner charged in that count been a nonfeasance, the indictment would have been bad after verdict. *Ib.*
5. That as it was a misfeasance, and the death of the child was alleged to have been caused thereby, the defective statement in the indictment must be taken to be supplied by the verdict. *Ib.*
6. *Receiving Stolen Goods.*] An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously received the said goods, knowing, &c., is bad as against A. B., but good against the receivers as for a substantive felony. *Regina v. Caspar*, 118.
7. *Aider by Verdict.*] After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count. *Regina v. Waverton*, 112.
8. *Reference from one Count to another.*] Any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count which merely introduced it by reference as the same subject "before mentioned." *Ib.*

For Burglary.] •

See BURGLARY.

See NUISANCE.

Proof of only part—when sufficient.] *Rex v. Hall*, 131, and note.

See GRAND JURY.

INFAMY.

See WITNESS.

INFANTS.

*Death of, by Neglect.]*See *Regina v. Waters*, 69.

INFORMATION.

See ACCOMPLISH.

INNKEEPER.

See RAILROADS.

INTENT.

Allegation of—when not necessary.]

See BURGLARY.

JEOPARDY.

What is Legal Jeopardy.] See *United States v. Perez*, 357, and note.

JOINT OFFENCES.

See note to *Rex v. Hall*, p. 133.

JUDGES.

1. *Liability of, to an Action.]* Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact. *Caldwell v. Halket*, 288.
2. The 21 Geo. 3, ch. 70, § 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bona fide*, in cases in which they have mistakenly acted without jurisdiction. *Ib.*

See JUSTICES OF THE PEACE.

JURISDICTION.

*Want of.]*See *Piper v. Pearson*, 284.

JURY.

1. *Separation of, before Verdict—Effect of.]* The dispersion of the jury with the permission of the judge during the interval of an adjournment in case of a misdemeanor, does not vitiate their verdict, where there is no suggestion of their having been improperly practised upon in the interim. *King v. Woolf*, 374.
 2. Whether the jury shall or shall not be permitted to separate before verdict, in cases of misdemeanor, is matter of discretion with the judge. *Ib.*
- Judges of the Law in Criminal Cases.]* At common law are the jury in every criminal case judges of the law as well as of the facts? Held by a majority of the court that they are; by BENNETT, J., that they are not. *The State v. Croteau*, 388.
- May be discharged before Verdict.]* See NEW TRIAL.

JURY TRIAL.

What it imports.]

See TRIAL BY JURY.

JUSTICES OF THE PEACE.

1. *Liability of, to an Action.]* A judge of an inferior court, acting in a case of which he has no jurisdiction, or exceeding his jurisdiction, is liable in damages to any party injured. *Piper v. Pearson*, 284.

2. Thus, a justice of the peace, who, in the course of the trial of a case of which a police court has exclusive jurisdiction, commits a witness to prison for contempt, is liable to an action by the witness. *Ib.*
3. As the police court of Lowell has exclusive jurisdiction of all offences committed within that city, a record of a conviction, before a justice of the peace for the county of Middlesex, of an offence alleged to have been committed in the city of Lowell, shows *prima facie* a want of jurisdiction in the justice. *Ib.*
4. The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction. *Ib.*

See JUDGES.

LARCENY.

1. *Lost Property—Animo Furandi.*] If a man find lost property without any marks indicating the owner, and without any circumstances attending the finding which would enable him to discover the owner, he does not become guilty of larceny by subsequently appropriating the property to his own use after he has ascertained the owner; although he intended to keep the property when he first picked it up. *Regina v. Thurborn*, 18.
2. *Lost Goods—Taking.*] Upon the trial of an indictment for stealing a bank-note, which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the prisoner knew the owner, or had reasonable ground for believing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if, at that time, he had not that knowledge or belief, he was not guilty:—
Held, a misdirection; because if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny. *Regina v. Preston*, 25.
3. *Actual and Constructive Possession.*] Where a miller, having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris, it was held to be larceny. *Commonwealth v. James*, 139.
4. It was held that the government was not bound to produce the truckman who carried the barilla to and from the mill, to prove that it was not adulterated in the transportation, although there was only circumstantial evidence that it was adulterated by the miller. *Ib.*
5. The word *barilla* is good in an indictment to denote the subject of larceny. *Ib.*
6. A commission to settle the boundaries of a manor is an instrument concerning the realty, and not the subject of larceny. *King v. Westbeer*, 454.

See BURGLARY; CONVICTION.

An actual Larceny does not merge a Conspiracy to commit.] See MERGER.

LIBEL.

Proof of Publication.] The publisher of a public Register receives an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the Register; after which he receives two letters in the same handwriting, directed as mentioned, and having the Irish postmark on the envelopes; which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed: this is a sufficient ground for the court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the Register in Middlesex for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex. *Rex v. Johnson*, 306.

LOST PROPERTY.

Larceny of.]

See LARCENY, 1, 2.

MALICE.

Presumption of.]

See MURDER.

MANSLAUGHTER.

See BAIL.

MERGER.

1. *Misdemeanor not merged in a Felony.]* Upon an indictment for misdemeanor, it is no ground for an acquittal, that the evidence necessary to prove the misdemeanor also shows that it is part of a felony, and that the felony has been completed. Thus, upon an indictment for a conspiracy to commit larceny, and charging that, in pursuance of that conspiracy, the larceny had been committed, the defendant is not entitled to an acquittal, though the evidence proves that he was guilty of felony, the conspiracy proved making him an accessory before the fact to the crime of larceny. *Regina v. Button*, 73.
2. The indictment charged that one C. L. was a dyer, and had in his possession vats and dye; and that the defendants were employed by the said C. L. as his servants, &c., and that it was their duty to use the said vats and dye for the profit and advantage of the said C. L., and for the dyeing, &c., of such woollen, &c., and other materials as might belong to themselves, or be intrusted to them by the said C. L. for the purposes aforesaid, and to use the vats and dye for no other purpose, and upon no other materials; and that the defendants conspired fraudulently, and without the consent of C. L., to use the said vats, &c., in the dyeing of materials not belonging to themselves, and not intrusted to them by C. L. for that purpose, and to obtain for themselves profits, and to deprive C. L. of the proper use of the said vats and dye; and that, in pursuance of that conspiracy, the defendants did wilfully, and without the consent of the said C. L., receive materials, and wilfully and without the consent of C. L., at his expense and with his dye, vats, &c., dye the said materials for their own profit. *Held*, good in arrest of judgment; and that as it was unnecessary to prove the overt act, the objection that the offence of conspiracy was merged in a felony did not arise upon the face of the indictment; though, if it had arisen, it could not have been sustained. *Ib.*

MISDEMEANOR.

Compromise of.] In an action of assumpsit, it appeared that plaintiff had indicted several persons for riot and assault upon a constable in the execution of his duty, and upon others aiding him, and for simple assaults; which offences were alleged to have been committed in impeding the execution of a *fi. fa.* issued by plaintiff against the goods of one of the persons indicted. Defendants, (being third parties,) in consideration that plaintiff would, at their request not further prosecute, promised to pay the balance in the original action remaining unsatisfied; and likewise the costs of the prosecution. Plaintiff, in consideration thereof, with the assent of the judge before whom the prosecution was, at the assizes, forebore to prosecute further. On demurrer to pleas which set out the indictment, and which, in answer severally to counts charging the different promises, relied upon the illegality of the contract:—*Held*, by the Court of Exchequer Chamber, affirming the judgment of Queen's Bench, that the consideration was unlawful, and that no action could be maintained on any of the promises. *Keir v. Leeman*, 262.

Compromise of.]

See COMPROMISE.

Conviction of—on a charge of Felony.]

See CONVICTION.

Not merged in a Felony.]

See MERGER.

MISFEASANCE.

*Death by.]*See *Regina v. Waters*, 69.

MURDER.

1. *Presumption of Malice—Burden of Proof.]* When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious, and an act of murder, and proof

- of matter of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution, or from evidence offered by the defendant. *Commonwealth v. York*, 504.
- 2. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence. *Ib.*
- 3. WILDS, J., dissenting, *held*, That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing. *Ib.*
- 4. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. *Ib.*
- 5. That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him. *Ib.*

See BAIL.

NAVIGABLE RIVER.

See NUISANCE.

NEGLIGENCE.

Death by.]

See *Regina v. Waters*, 69.

NEW TRIAL.

- 1. *Discharge without consent.*] The court may discharge a jury from giving a verdict in a capital case, without the consent of the prisoner, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated. *United States v. Perez*, 357.
- 2. *Discharge of a Jury without a Verdict.*] The court have power in a capital case to discharge a jury after they have been sworn and charged with the prisoner, without their giving any verdict; and if so discharged at the prisoner's request, he may again be put on trial. *Kinlock's case*, 337.
- 3. *Power to Grant.*] This court has power to grant a new trial, on the motion of one convicted of a capital offence, sufficient cause being shown therefor. *Commonwealth v. Green*, 464.
- 4. *Illegal Testimony.*] The admission of illegal testimony against the prisoner on his trial, after objection by his counsel, would be a good cause for granting a new trial. *Ib.*
- 5. *After Conviction.*] A defendant who has been acquitted upon one of several counts in an indictment, is entirely discharged therefrom, nor can he a second time be put upon his trial upon that count. *Campbell v. The State*, 498.
- 6. *Effect of.*] Where a defendant has been acquitted on some counts and convicted upon others, a motion for a new trial made by him generally is applicable only to the count upon which he was convicted, and if the court set aside the whole verdict, it is erroneous. *Ib.*
- 7. The prisoner was acquitted upon the first and third counts, but convicted on the second. He moved for a new trial, which was granted, and the entire verdict set aside by the court. Upon the second trial, he moved the court to put him on trial upon the second count only; this the court refused. Upon the second trial he was acquitted on the first and second counts, and convicted on the third. *Held*, that it was error in the court to set aside the verdict entirely, and that the accused was entitled to judgment of acquittal upon the first and third counts, because upon these he was acquitted by the jury upon the first trial, and that he was also entitled to judgment of acquittal upon the second count, because he was acquitted on that count upon the second trial. *Ib.*

NONFEASANCE.

Death by.]

See *Regina v. Waters*, 69.

NUISANCE.

1. *Advantages of—No Defence.*] On the trial of an indictment for a nuisance in a navigable river and common king's highway, called the harbor of C., by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of guilty. *King v. Ward*, 1.
 2. It is no defence to such an indictment, that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port. *Ib.*
- Rex v. Russell*, 6 B. & C. 561, overruled. *Ib.*

ONCE IN JEOPARDY.

See NEW TRIAL.

PARENT AND CHILD.

See *Regina v. Waters*, 69.

PERJURY.

Dying Declarations not admissible to prove.] See DYING DECLARATIONS, 3.

PLEADING.

See BURGLARY; FORMER ACQUITTAL; INDICTMENT; RECEIVING STOLEN GOODS.

PRACTICE.

Presence of Defendant—Necessary.] See PRESENCE.

PRESENCE.

In a prosecution for felony, the accused must be arraigned and plead *in person*, and in all the subsequent proceedings he must appear *in person*, not by attorney; and such appearance in person must be shown by the record. *Sperry v. The Commonwealth*, 449.

PRESUMPTION.

See MURDER.

PROMISSORY NOTE.

Compounding Prosecution.] A promissory note, given for compounding a public prosecution for a misdemeanor, is founded upon an illegal consideration. *Jones v. Rice*, 278.

PUBLICATION.

Proof of.]

See LIBEL.

RAILROADS.

1. *Reasonable Regulations.*] A railroad corporation has authority to make and carry into execution reasonable regulations for the conduct of all persons using the railroad or resorting to its depots, without prescribing such regulations by by-laws; and the superintendent of a railroad depot, appointed by the corporation, has the same authority, by delegation. *Commonwealth v. Power*, 36.
2. *Superintendent—Power of.*] A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers or interrupt the officers and servants of the corporation in the discharge of their duties. *Ib.*

3. *May use necessary Force.*] Where the entrance of innkeepers, or their servants, into a railroad depot, to solicit passengers to go to their inns, is an annoyance to passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, the superintendent of the depot may make a regulation to prevent persons from going into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and, after notice to leave the depot, refuse so to do, he and his assistants may forcibly remove them; using no more force than is necessary for that purpose. *Ib.*
4. *Assault and Battery.*] If an innkeeper who has frequently entered a railroad depot, and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with the *bonâ fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery. *Ib.*

RECEIVING STOLEN GOODS.

In an indictment for the substantive felony of receiving stolen goods, an allegation that the goods were stolen "by a certain evil-disposed person," is good, without stating the name of the principal felon, or averring that he is unknown. *Rex v. Jervis*, 127.

SICKNESS.

Of Judge or Jury—Good cause for a discharge of Jury.] See p. 36.

SUPERINTENDENTS OF RAILROADS.

Power of.] See RAILROADS.

TAKING.

To constitute Larceny.] See LARCENY.

TRESPASS.

Against Justices of the Peace.] See JUSTICES OF THE PEACE.

TRIAL BY JURY.

1. *Twelve necessary—Unanimous Verdict.*] Trial by jury, at common law, means a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a conviction can be had. *Work v. The State*, 327.
2. A statute diminishing the number of such a jury in a criminal case, or authorizing a verdict without a unanimity, is contrary to the Constitution, and wholly void. *Ib.*

UNANIMITY.

Necessary in all Jury Trials.] See TRIAL BY JURY.

VERDICT.

A finding that an embankment in a river is a nuisance, but that the inconvenience is balanced by the public benefit, is a verdict of guilty. *King v. Ward*, 1.

Must be unanimous.] See TRIAL BY JURY.

When it aids a Defective Indictment.] See *Regina v. Waters*, 69.

Defendant must be present when the Verdict is returned.] See *Sperry v. The Commonwealth*, 449.

WARRANT.

See BAIL, 3.

WITNESS.

1. *Objections to.*] Objections to the competency of a witness, founded on a conviction of crime, must be made at the trial, and when the witness is offered to be sworn; and must be supported by the record of the conviction and judgment. *Commonwealth v. Green*, 464.
2. *Infamy.*] The conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness in the courts of this State. *Ib.*

Committed for Contempt.] See *Piper v. Pearson*, 284.

See HUSBAND AND WIFE.

